

F2PMBUC1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 LEE E. BUCHWALD, as Chapter 7
4 Trustee for Magnesium
5 Corporation of America and
6 Related Debtor, Renco Metals,
7 Inc.,

8 Plaintiff,

9 v.

13 CV 7948 (AJN)
Trial

10 THE RENCO GROUP, INC., a
11 Delaware corporation, et al.,

12 Defendants.

13 New York, N.Y.
14 February 25, 2015
15 9:25 a.m.

16 Before:

17 HON. ALISON J. NATHAN,

District Judge

18 APPEARANCES

19 BEUS GILBERT, PLLC
20 Attorneys for Plaintiff
21 BY: LEO R. BEUS
22 SCOT C. STIRLING
23 ROBERT STIRLING
24 MALCOLM LOEB

25 KAYE SCHOLER LLP
Attorneys for Defendants
BY: H. PETER HAVELES, JR.
JEFFREY A. FUISZ
-and-
PARK JENSEN BENNETT LLP
BY: TAI H. PARK
STEVEN C. BENNETT

F2PMBUC1

1 (Trial resumed; jury not present)

2 THE COURT: I don't see present Mr. Beus or Mr. Park.

3 MR. HAVELES: Your Honor, Mr. Park, he e-mailed me.

4 He got stuck in traffic on the Bruckner and asked that the
5 Court not wait for him and he apologized.

6 MR. S. STIRLING: Your Honor, Mr. Beus is here. He
7 must have just stepped out for the moment.

8 THE COURT: I received a letter this morning from
9 defendants. Is this from you, Mr. Haveles?

10 MR. HAVELES: Yes, your Honor.

11 THE COURT: I know there have been other times when
12 letters were written by Mr. Park but signed by you. This is
13 from you.

14 MR. HAVELES: I wrote this myself, your Honor, at 7:20
15 this morning.

16 THE COURT: Maybe it was the early morning, but it
17 seems to me that there are statements in here which I truly, in
18 all of the things I have seen in this case I find -- the most
19 charitable word I can come up with is just wrong.

20 MR. HAVELES: All right, your Honor.

21 THE COURT: I want you to address it because I'll just
22 read the line. The Court precluded defendants in this action
23 from putting forward any evidence whatsoever about the RCRA
24 action beyond stating that it is unresolved as of today. Is
25 that true or false?

F2PMBUC1

1 MR. HAVELES: Your Honor, it's incomplete and I
2 apologize.

3 THE COURT: It's not incomplete.

4 MR. HAVELES: Your Honor, I believe that we were
5 precluded from putting in any evidence of what had happened in
6 the course of the action and that's what I meant to say and I
7 apologize --

8 THE COURT: When you asked a question, I forget who
9 the witness was, about summary judgment in that action, did I
10 preclude you?

11 MR. HAVELES: You sustained the objection to that,
12 your Honor.

13 THE COURT: You are wrong. And I am going to read the
14 transcript from my discussion with Mr. Park on this. You were
15 here for that.

16 MR. HAVELES: Yes, your Honor.

17 THE COURT: We had a lot of back and forth. There is
18 a lot I underlined from this portion of the transcript in
19 thinking how you could have made this statement in this letter.
20 I'm reading at page 1686 of the transcript.

21 MR. HAVELES: Do you have a day, your Honor? Because
22 I have it by day.

23 THE COURT: February 12. Starting at line 19,
24 although it started much earlier. It's in the context of a
25 long back and forth between Mr. Park and me on a request to

F2PMBUC1

1 have Mr. Thayer testify as to what an unfinalized EPA offer of
2 settlement, which was the evidentiary issue on the table.

3 MR. HAVELES: Yes, your Honor.

4 THE COURT: And a letter came in in response to that
5 issue from defendants, I think that was the one that I said
6 sounded like Mr. Park. We had a long discussion about that
7 piece of evidence. I said there were 408 problems, I said
8 there were hearsay problems. I said there was a nonfinality
9 issue of settlement that would be confusing. I also said there
10 is a certain kind of late surprise, quoting myself. It feels
11 like sandbagging, to be honest, because it had never been
12 anticipated that Mr. Thayer would testify about, and this was
13 the issue on the table, the EPA offer of a nonfinalized
14 settlement, though you have known since, as far as I can tell,
15 the beginning of time of this litigation and stipulated to the
16 fact yourself and have spent an inordinate amount of time
17 bringing it to the jury's attention that there has not yet been
18 or ever been liability assessed.

19 And now I am going to read from page 1686, beginning
20 at line 19. I have not precluded you from trying to make as
21 much as you can out of the fact that all of this time later
22 hasn't been liability. I think the only time I have addressed
23 anything specific to these issues, there were deposition
24 designations from -- I said EPA lawyers, but I don't think
25 that's right, that went into the district court's original

F2PMBUC1

1 decision dismissing and then the affirmance and all of the
2 complications of that. I did sustain that objection and I'll
3 note here -- this is not quoting from the transcript -- that
4 was in limine pretrial and, as I said all along, and as was
5 done in many instances, issues could be reraised as things
6 played out differently at trial.

7 Continuing with the transcript, 1687, line 1: And
8 then I think the second one that I'm dealing with is this one,
9 which has come up in the middle of trial and has a host of
10 evidentiary problems that I don't see a response to. You are
11 not precluded. When I read your letter I thought, good point,
12 but what is missing is what you said, which is, it's got to tie
13 back, just like they are eliciting the fact of the RCRA
14 litigation. There is just no doubt that there are inferences
15 available to tie it back to contingent liabilities that existed
16 several years earlier. I think there is a possible line for at
17 least the defendants' views as to the vindication of their
18 understanding of the contingent liabilities in the relevant
19 time period by events that have occurred afterwards, and I have
20 not prevented you from making those points except in the ways
21 that you have attempted in the two instances that we have
22 talked about.

23 There are other places in the course of that long
24 discussion with Mr. Park in which I just was as clear as clear
25 can be that it was not a total bar, that I was open to the

F2PMBUC1

1 possibility of evidentiary admissible evidence being
2 permissible. And so then I read this letter this morning and I
3 am going to read it again and ask if it's true. Maybe I'm
4 missing something. The Court precluded defendants in this
5 action from putting forward any evidence whatsoever about the
6 RCRA action beyond stating that it is unresolved as of today.

7 Is that just incomplete or is that not true? Connect
8 the dots for me.

9 MR. HAVELES: Yes, your Honor. I believe during the
10 course of that colloquy and additional colloquy, I can't
11 remember which right now -- and I confess, fatigue has blurred
12 things together here -- we also had a discussion during the
13 course of Mr. Thayer's testimony where I wanted to proffer the
14 fact of summary judgment and the summary judgment decision that
15 had been issued by the district court, and that objection was
16 sustained.

17 THE COURT: It was. And to be clear, a new different
18 argument was made, but you wanted the factual findings of the
19 district court to come in. And the problem with that is that
20 that is no longer an existing district court decision. It has
21 been vacated by the Tenth Circuit. And then you made an
22 argument in the 56.1 papers they didn't contest some of these
23 things. All of that might have been possible to deal with, but
24 you couldn't, just in the course of the trial, offer the
25 district court opinion because of all of the confusion that it

F2PMBUC1

1 engendered.

2 Nevertheless, you ask multiple witnesses --

3 MR. HAVELES: There is no question, your Honor, I
4 asked, was there a judgment or determination there. Your
5 Honor, I understood, because I try to deal with evidence
6 through competent witnesses, that when your Honor granted the
7 motion in limine to preclude us from calling Mr. Ford or
8 Mr. Wikstrom, which we proffered to talk about, the procedural
9 posture and the defenses that were put forward on behalf of the
10 parties in the case to show exactly what you talked about just
11 a moment ago, when you and I were just talking separate and
12 apart from reading the transcript about whether we had -- what
13 the good -- what our basis for defending and so forth was.
14 That evidence was precluded.

15 THE COURT: But it was precluded in limine and it was
16 precluded precisely because of the complications of the effort
17 to rely on a vacated district court decision. That is wholly
18 separate and apart from a proffer. And I don't know what it
19 is, but it wasn't put in front of me. How do we tell the jury
20 what is relevant, and this is what you said in the letter, but
21 it was not part of the evidentiary proffer, that is to say, the
22 later letter that I was responding to regarding Mr. Thayer's
23 testimony.

24 MR. HAVELES: Yes, your Honor.

25 THE COURT: How to tie those matters in with the

F2PMBUC1

1 vindication, in a sense, of the defendants' position regarding
2 the waste water streams and the Bevill amendment and all of
3 that. I could not have been clearer on February 12 that I saw
4 relevance, I saw the possibility of doing it in a
5 nonprejudicial way. But what was in front of me then wasn't
6 it.

7 MR. HAVELES: Your Honor, our proffer with respect to
8 Messrs. Wikstrom and Ford went beyond merely the summary
9 judgment, but it was to talk about all the defenses that had
10 been asserted, including the current posture of the defenses,
11 meaning, what was left after the remand from the Tenth Circuit
12 about the attempt to apply the interpretation retroactively,
13 which was arbitrary and capricious. There is the full panoply
14 that we outlined in our motion in limine at that time.

15 I say this, your Honor, not to show disrespect for
16 you, but out of also the respect that I have for the rules of
17 evidence, Mr. Thayer, with Mr. Wikstrom and Mr. Ford precluded
18 as witnesses, to get into those kinds of issues and defenses,
19 Mr. Thayer or Mr. Tripp would not have been competent witnesses
20 if I was going to have testimony of that on a personal
21 knowledge basis.

22 And so the effect of precluding the Ford and Wikstrom
23 testimony was to mean that except to the extent that I could
24 say that these individuals were personally involved -- and they
25 weren't handling the litigation. They testified about their

F2PMBUC1

1 personal views and we elicited that, but not about what's been
2 going on with the litigation. Via a competent witness who we
3 were allowed to call, I don't believe, and maybe it's because
4 I'll accept your Honor's suggestion that my views of competence
5 might be too narrow and short-sided in that regard, but I don't
6 believe we had a competent witness through whom I could elicit
7 such testimony beyond the fact that the action is stuck.

8 THE COURT: And, again, I am going to start all of
9 this, which is how it came to me. This issue, which is a very
10 complex, fact-specific issue came to me not with defendant
11 saying, Judge, there is just no way you can let them talk about
12 the filing of the RCRA litigation because if they do, then it
13 just opens up all of this stuff that we can't do. What came to
14 me was stipulation of fact in the joint pretrial order. So any
15 notion that it was about how the plaintiff has made too much of
16 it is baloney; charitably, baloney.

17 MR. HAVELES: Your Honor, I'm not questioning that
18 point.

19 THE COURT: It came to me with an agreement,
20 essentially, between the parties as to those facts and then,
21 yes, the in limine came and I said repeatedly in the in limine,
22 these are preliminary. Things change at trial. You can
23 reraise. And you did on some. And that in limine
24 specifically, the reasoning, the rationale was in the context
25 of, and I think this is clear from my reading of my ruling,

F2PMBUC1

1 what I understood wanted to be done, which was to go through
2 the district court's findings, which had been vacated, Tenth
3 Circuit's decision, all of that, which then opens up Chevron
4 deference, any host of things.

5 MR. HAVELES: I understand.

6 THE COURT: So I understood, essentially, with that
7 specific piece of it not permitted because of the obvious
8 complications and prejudice and side shows and confusion, I
9 understood, essentially, the position of the parties to be, all
10 right, we understand. There is this balance. They can say the
11 litigation was filed and we can say, as we did, and the we is
12 the defendants, I want to say maybe a hundred times in this
13 trial --

14 MR. HAVELES: I know. Probably more.

15 THE COURT: -- fifteen years have gone by and there is
16 no liability, and they never objected to that.

17 MR. HAVELES: Your Honor, the issue raised in this
18 letter is not anything more than the comment that Mr. Rennert
19 was kicking the can down the road and just trying to
20 procrastinate and avoid getting a resolution.

21 THE COURT: We will get to that. I got stopped by
22 what I thought was --

23 MR. HAVELES: I apologize if I misphrased it in a way,
24 your Honor, because that was not my intent. I hoped during the
25 course of the four weeks we have been spending a lot of time

F2PMBUC1

1 together, plus the earlier time, that your Honor understands
2 that I try to show some fidelity to the record. If I wrote it
3 in a way that did not, I apologize. That was not my intention.

4 THE COURT: Just to be clear, no one left here as a
5 boy scout, in my view. I'm sorry. I know everybody has been
6 at this for a long time. I know you're exhausted as a result
7 of this trial. I know that everybody is zealously representing
8 their clients. But there have been problems on both sides, and
9 this is one of them. You said it was a misstatement. You
10 wanted me to instruct the jury. The application here is:
11 Request your Honor instruct the jury that Mr. Beus' comments
12 were inappropriate, which is a separate issue, that the Court
13 had determined that no evidence regarding the litigation of the
14 RCRA action would be admitted into evidence and that there is
15 no evidence regarding Mr. Rennert delaying the RCRA action and
16 thus kicking down the road.

17 I can't do that because it's not true.

18 MR. HAVELES: I understand. Your Honor, I understand
19 what your Honor is telling me.

20 THE COURT: Anything else?

21 MR. HAVELES: No, your Honor.

22 Just to be clear, when you say you can't do it, your
23 Honor, is it for the entirety of the request or the particular
24 clause that your Honor just --

25 THE COURT: That's the application in front of me I

F2PMBUC1

1 can't do.

2 MR. HAVELES: Even with the middle clause deleted
3 then. Because the principal part of this is the inference that
4 somehow Mr. Rennert is responsible for a delay in the
5 resolution of the environmental litigation.

6 THE COURT: No. I'm denying that request. I
7 sustained the objection. Was there an instance where I didn't
8 sustain that objection? There may have been one. I don't
9 know.

10 MR. HAVELES: There are other instances where you
11 didn't, but, your Honor, I'm only focusing on this issue
12 because it was in the context of punitives and tying it to
13 sending a message to Mr. Rennert about the environmental
14 litigation. Because the other comments were about kicking the
15 can in this lawsuit, not about the environmental litigation.

16 THE COURT: Can you point me to the specific language
17 in the transcript from yesterday.

18 MR. HAVELES: Yes, your Honor. The language that's
19 the subject of my letter is at the very end of the closing, on
20 page 2868. It's lines 9 through 16 that I object.

21 THE COURT: At line 18 I sustained. The jury will
22 disregard Mr. Beus' last comment.

23 MR. HAVELES: Yes, your Honor.

24 The nature of the way you sustained it, it was a
25 paragraph to which I was objecting, whether it is also

F2PMBUC1

1 ambiguity as to whether it is the last of the series to which I
2 objected in that paragraph.

3 THE COURT: If anything, the ambiguity cuts in your
4 favor because it sounds like I'm striking the whole paragraph.

5 MR. HAVELES: The next objection you did not sustain,
6 but it was a different point, your Honor. And because he was
7 talking about, when mentioned on page 2808, it was in
8 connection with this lawsuit, your Honor, I did not object at
9 that time.

10 THE COURT: I don't think there is anything additional
11 that needs to be done on that point.

12 Anything else?

13 MR. PARK: Judge, if I could be heard very briefly.

14 THE COURT: Sure.

15 MR. PARK: 2868 is the most prominent part of that
16 sentence where Mr. Beus says: In light of how difficult they
17 have been with the United States Government, how callous they
18 have been, at that point Mr. Haveles objected and your Honor
19 sustained and said the jury will disregard the last comment.

20 I believe it will be entirely unclear to the jury that
21 that's a reference to Mr. Rennert kicking the litigation down
22 the road. Your Honor is absolutely correct, given the way that
23 the stipulations have played out and what both parties have
24 made of the RCRA litigation, the primary defense on that issue
25 was to highlight for the jury that that litigation has not

F2PMBUC1

1 resolved any liability after all of this time.

2 THE COURT: Clearly a strategic choice you made, and I
3 understand it.

4 MR. PARK: Mr. Beus spent probably the last 15 minutes
5 of his summation essentially reading from the RCRA litigation,
6 reading from the complaint, reading from EPA submissions of
7 their position. For him to then essentially in three or four
8 words dismantle the one defense we have to all of that, which
9 is to say, it's not just about the EPA making these
10 allegations, if it were that simple, this case would have
11 resolved it in liability. For him to essentially dismantle all
12 of that by suggesting that Mr. Rennert caused a delay, when
13 they know well and truly that is not true, there is absolutely
14 zero evidence in the record that Mr. Rennert had anything to do
15 with any delays, there have not been any delays, that case is
16 enormously complex, it resulted in a judgment against the EPA,
17 which was vacated, but with findings of fact that as a matter
18 of law the findings of fact are not somehow no longer valid.

19 So I believe, your Honor, it is critical, critical to
20 our defense that the jury be made to understand, Mr. Beus made
21 comments about Mr. Rennert kicking that litigation, the RCRA
22 litigation, down the road. Ladies and gentlemen, there is no
23 evidence of it, you are to disregard that comment. That's all
24 we are asking for, Judge. I think it's critical to our
25 position. Otherwise, the jury is going to go back in and, in

F2PMBUC1

1 my experience, they will latch on to that kind of comment and
2 say, that case hasn't gone anywhere because Ira Rennert is very
3 good at just dragging these things out. And there is no basis
4 for that kind of a comment. There is no basis in the record
5 and it's highly prejudicial to the one defense we have had
6 submitted in this case, to the volumes of information that he
7 have been inundated with about the RCRA and EPA obligations.
8 That's all we are asking for, Judge. I think it's fair. There
9 is no basis in the record for that comment.

10 THE COURT: I'll hear you, Mr. Beus, or Mr. Stirling.

11 MR. S. STIRLING: Your Honor, this gives new meaning
12 to the word inconceivable. That they could stand up and say
13 that there is no evidence in the record of the defendants
14 kicking the can down the road with respect to these
15 environmental liabilities is absolutely preposterous. And the
16 specific statement made by Mr. Beus in the closing argument at
17 page 2868 was not about the RCRA litigation specifically alone
18 or at all. It was about their behavior since 1989, when Renco
19 Group acquired this business.

20 With respect to the RCRA liability, the evidence of
21 their kicking the can down the road begins -- first, let me
22 say, their testimony from Mr. Rennert in this courtroom in
23 front of this jury that one of the things he really admired
24 about the management at MagCorp was that they were proactive in
25 their approach to managing environmental issues, that they got

F2PMBUC1

1 out in front of their environmental responsibilities and took
2 care of them. That was a claim that they made in front of this
3 jury. And they said repeatedly -- they didn't just say there
4 has been no determination of liability. They said, as you
5 noted, there is no liability. There is no liability.

6 THE COURT: Over and over again.

7 MR. S. STIRLING: We let that go because we think they
8 are entitled to make their interpretation of the evidence in
9 argument to the jury and that was their claim. We put in a lot
10 of evidence that apparently caused them some distress that
11 there is liability, that they were illegally disposing of
12 hazardous waste at this site for years, that they were hiding
13 it from EPA, that they did nothing to report it or to address
14 it until they got caught in this litigation filed in January
15 2001.

16 Let me recite that for you. First, let me go to the
17 Bevill amendment issue. The final rule was adopted in June
18 1991. Exhibit 8050 is the Anderson memo dated 1992. It is an
19 agreed fact, No. 75 in the joint pretrial report, that was
20 received by MagCorp in 1993. So they knew EPA -- this is the
21 Anderson memo -- they knew, EPA said all of your waste streams
22 are not exempt. You only have two exempt waste streams.

23 What was Mr. Tripp's testimony. Here in court he
24 said, in essence, and I'm paraphrasing because I have not got
25 it in front of me, I ignored that. That's from Anderson in

F2PMBUC1

1 region 8. He doesn't know what he's talking about. I only pay
2 attention to the guy Shapiro who wrote a memorandum in 1994
3 that Mr. Tripp claimed disagreed with Mr. Anderson and showed
4 that, in fact, EPA in DC agreed with Mr. Tripp's interpretation
5 of the Bevill amendment.

6 THE COURT: We have our jurors. Thank you. I'm
7 denying your request for a couple of reasons. I sustained the
8 objection. I told the jury to disregard. No request is made
9 contemporaneously to do anything beyond that when the jury was
10 here and it was in the flow. Essentially I think what
11 defendants are asking me, I am not saying this is your
12 intention, but the effect would be, and maybe it is your
13 intention, a kind of rebuttal point. You made everything you
14 could as your strategic decision of the lack of liability. I
15 didn't stop you. They didn't object. You did that. And they
16 made a point about kicking it down the road.

17 I think it went too far because it was tied
18 specifically to Mr. Rennert and there is certainly no testimony
19 or evidence to show that he did anything to kick it down the
20 road. And that's why I sustained the objection and told them
21 to disregard.

22 What wouldn't be fair would be to come back in the
23 next day and make your point as the final point right before
24 they are going into their deliberations. It bothered me,
25 obviously, that the request was framed in what I think is just

F2PMBUC1

1 not a legitimate characterization of what had occurred in this
2 trial, but I cooled down from that and took your request
3 genuinely and seriously, and I don't think it's fair. I won't
4 do it. Had the request been made yesterday, maybe. I think
5 the objection occurred right during the sentence that was
6 objectionable and it was sustained and the jury was told to
7 disregard. I would have reflected on an additional request at
8 the time, but not now and not like this.

9 Anything else?

10 MR. S. STIRLING: Nothing from the plaintiff, your
11 Honor.

12 MR. PARK: Your Honor, I apologize for coming in late
13 today.

14 THE COURT: I understand. Thank you.

15 MR. HAVELES: Nothing else, your Honor.

16 THE COURT: I will say, despite a month-long trial and
17 a demanding schedule, I am grateful that everybody has worked
18 as hard as they have to be here on time so we could keep things
19 moving. So thank you.

20 We will get the jury.

21 One point. I don't always read the verdict form to
22 the jury, but because there are a fair number of directions in
23 the verdict form that are obviously consistent with the charge,
24 the signaling directions and the like, it is my intention to
25 just read through the verdict form as well, and the reason we

F2PMBUC1

1 do any of this is just to make sure everybody is hearing the
2 instructions at least once.

3 MR. PARK: Your Honor, I apologize, but I found
4 another cite where your Honor overruled Mr. Haveles' objection.
5 This is on page 2859, starting at line 15 going through line
6 23. What Mr. Beus said there is, quote: They never did what
7 their duty required them to do. They needed to go out and test
8 and characterize. They knew it was there. They waited to get
9 caught. They didn't investigate. They didn't study. They
10 didn't report.

11 THE COURT: No objection.

12 MR. PARK: Probability of having a problem with that
13 is very close to a hundred percent and they have got a problem,
14 and they have been litigating for over a decade.

15 THE COURT: True fact in the record.

16 MR. PARK: Mr. Rennert has a notion, just put it off
17 down the road, put it off, put it off, put it off, in
18 capitalization. Objection. Overruled.

19 Judge, that is a clear statement of the idea that Mr.
20 Beus was submitting to the jury, which your Honor overruled.
21 What your Honor sustained was a further statement later which
22 we have just discussed where he has this discussion about the
23 United States Government and how difficult Mr. Rennert has
24 been. This is where I think, because Mr. Beus injected this
25 notion at least two times, and most clearly on this page 2859,

F2PMBUC1

1 that's where the prejudice comes, Judge. And that's where the
2 lack of clarity as to what was struck on page 2868 becomes a
3 real issue.

4 Judge, I understand this happened yesterday. We are
5 reading the transcript when we get it later yesterday night and
6 we see this. We feel the impact at the time. But it's often
7 the case you rereview a transcript and you realize how much
8 impact this is likely to have. I believe that overruling that
9 objection, your Honor, was incorrect, and we would ask you to
10 cure the statement that Mr. Beus made at that time.

11 THE COURT: Was this in the letter that you sent me
12 last night?

13 MR. HAVELES: It was not in this morning's letter,
14 your Honor.

15 MR. S. STIRLING: I would like to be heard on this,
16 your Honor.

17 THE COURT: Go ahead.

18 MR. S. STIRLING: Your Honor, first, so the record is
19 clear, with respect to the objection that you sustained on page
20 2868, we believe that objection should not have been sustained.
21 You've explained your reasons. Because you said there was no
22 evidence in the record that Mr. Rennert was responsible for
23 that. There is evidence in the record, your Honor, they had
24 monthly meetings --

25 THE COURT: We are done. The jury is here.

F2PMBUC1

1 MR. S. STIRLING: Thank you.

2 THE COURT: I took up what was presented to me
3 yesterday, I let people ask for side bars yesterday. You put
4 in a letter this morning. The jury is standing outside the
5 door. We are done.

6 (Jury present)

7 THE COURT: Good morning, members of the jury. Thank
8 you very much for your attention and diligence throughout the
9 trial, as I've said, but can't be said enough how grateful the
10 Court is for all your efforts. And those efforts continue now.
11 It is my job to instruct you as to the law that you'll apply
12 during your deliberations. I have prepared a written charge
13 that is the written instructions, and you will get copies of
14 the written instructions when you go back to the jury room.
15 You will each have a copy of everything that I'm about to say
16 to you, and you will also have the verdict form which I will
17 also read. But it is important for me to make sure that you
18 are hearing the instructions from me, though you will get the
19 paper and can study the words more yourself as you go.

20 With that, members of the jury, let me begin.

21 Instruction No. 1, role of the Court and the jury.

22 I will now instruct you as to the law. It is your
23 duty to accept these instructions of law and apply them to the
24 facts as you determine them. If an attorney has stated a legal
25 principle different from any that I state to you in my

F2PMBUC1

Charge

1 instructions, it is my instructions that you must follow. You
2 should not single out any instruction as alone stating the law;
3 you should consider my instructions as a whole when you retire
4 to deliberate.

5 You, the members of the jury, are the sole and
6 exclusive judges of the facts. You pass upon the evidence.
7 You determine the credibility of the witnesses. You resolve
8 such conflicts as there may be in the testimony. You draw
9 whatever reasonable inferences you decide to draw from the
10 facts as you have determined them, and you determine the weight
11 of the evidence. You must weigh and consider the evidence
12 without regard to sympathy, prejudice, or passion for or
13 against any party.

14 What has been said in the opening statements, closing
15 arguments, objections, or questions is not evidence. The
16 evidence before you consists of the answers given by witnesses,
17 the exhibits that were received in evidence, and any facts to
18 which the parties have stipulated. You may not consider any
19 testimony that I have told you to disregard or that was
20 stricken from the record.

21 Nor is what I say evidence. The rulings I have made
22 during the trial are not any indication of my views of what
23 your decision should be. Since you are the sole and exclusive
24 judges of the facts, I don't mean to indicate any opinion as to
25 the facts or what the verdict should be. The rulings I have

F2PMBUC1

Charge

1 made during the trial are not any indication of my views of
2 what your decision should be as to whether or not the plaintiff
3 has proven his case.

4 Instruction No. 2, preponderance of the evidence.

5 In order to prevail, the plaintiff must meet his
6 burden of proof. The standard under which you will decide
7 whether the plaintiff has met his burden of proof on a
8 particular issue is the preponderance of the evidence. Some of
9 you may have heard of proof beyond a reasonable doubt, which is
10 the proper standard of proof in a criminal trial. That
11 requirement does not apply to a civil case such as this and you
12 should put it out of your mind.

13 To establish something by a preponderance of the
14 evidence means that the evidence of the party having the burden
15 of proof must be more convincing and persuasive to you than the
16 evidence opposed to it. The difference in persuasiveness need
17 not be great; it requires only that you find the scales tip,
18 however slightly, in favor of the party with the burden of
19 proof, that what that party claims is more likely than not
20 true. On the other hand, if you find that the credible
21 evidence is evenly divided between the parties, that is,
22 equally probable that one side is right as it is that the other
23 side is right, then you must decide that issue in favor of the
24 defendants.

25 What is important is the quality of the evidence and

F2PMBUC1

Charge

1 not the number of witnesses, or the number or variety of the
2 exhibits, or the length of time spent on a subject. In
3 determining whether any fact has been proved by a preponderance
4 of the evidence, you must consider the testimony of all of the
5 witnesses and all of the exhibits.

6 Simply because I have permitted certain evidence to be
7 introduced does not mean that I have decided on its importance
8 or significance. That is for you to decide.

9 No. 3, improper considerations.

10 Your verdict must be based solely upon the evidence,
11 or lack of evidence, developed at trial. It would be improper
12 for you to consider any personal feelings you may have about a
13 party or witness' race, sex, age, national origin, or religion.
14 Under your oath as jurors, you are not to be swayed by
15 sympathy.

16 No. 4, conduct of counsel.

17 It is the duty of the attorney for each side of a case
18 to object when the other side offers testimony or other
19 evidence that the attorney believes is not properly admissible.
20 Counsel also have the right and duty to ask the Court to make
21 rulings of law or hold conferences out of the hearing of the
22 jury. All those questions of law must be decided by me.

23 You should not show any prejudice against any party or
24 his client because the attorney objected to the admissibility
25 of evidence, asked for a conference out of the hearing of the

F2PMBUC1

Charge

1 jury, or asked the Court for a ruling on the law.

2 No. 5, liability in general.

3 We turn now to legal responsibility, known as
4 liability. If a party making a claim against another party
5 proves each of the essential elements of its claim by a
6 preponderance of the credible evidence, we say that the party
7 has established that the other party is legally liable. The
8 plaintiff in this case is Lee E. Buchwald, who is the trustee
9 for two corporations in bankruptcy, Magnesium Corporation of
10 America and Renco Metals, Inc. Together, I will sometimes call
11 these companies the debtor companies or debtor corporations.
12 There are 12 defendants in this case. One, the Renco Group,
13 Inc., is a corporation. Ten are individuals: Ira Rennert,
14 Roger Fay, Justin D'Atri, Dennis Sadlowski, Michael Ryan,
15 Michael Legge, Ron Thayer, Todd Ogaard, Lee Brown, and Howard
16 Kaplan.

17 Final defendants are the trustees of trusts
18 established by Ira Rennert.

19 Although there are several defendants in this case and
20 they are being represented by the same attorneys, it does not
21 follow that if one is liable, all of the rest are liable as
22 well. Each defendant is entitled to fair, separate, and
23 individual consideration of the case without regard to your
24 decision as to the other defendants.

25 You must now determine, in accordance with my

F2PMBUC1

Charge

1 instructions, whether the plaintiff has carried his burden of
2 proving by a preponderance of the credible evidence that the
3 defendants are liable for his various claims.

4 No. 6, overview of the claims.

5 In this civil case, the plaintiff is suing the
6 defendants for damages, and to "avoid" or take back transfers
7 of money to the defendants. The plaintiff has alleged that the
8 defendants made or received unlawful transfers of money away
9 from the debtor corporations.

10 The plaintiff's first set of claims is brought
11 pursuant to bankruptcy law for claims of fraudulent transfer
12 and under state law for claims of fraudulent conveyance. These
13 claims are similar but defined differently under state and
14 federal law, so you must consider plaintiff's claims under both
15 definitions.

16 The plaintiff's second set of claims alleges that some
17 defendants either breached certain duties they had toward the
18 debtor corporations, or aided others in the breach of those
19 duties.

20 A third set of claims alleges that defendants paid or
21 received dividends or stock redemptions when doing so was
22 unlawful.

23 Finally, the plaintiff has alleged that defendants
24 Rennert and the trustees of the Renco trusts were unjustly
25 enriched by the transfers made from Magnesium Corporation and

F2PMBUC1

Charge

1 Renco Metals.

2 You should make your award based on the merits of each
3 claim.

4 I will now explain each of those claims in more
5 detail.

6 No. 7, claim one: Fraudulent transfer, bankruptcy
7 code.

8 Plaintiff's first claim is for fraudulent transfers.
9 The bankruptcy law allows a trustee to avoid, or, in other
10 words, take back, transfers of money made under certain
11 circumstances. In this context, a transfer refers to any mode
12 of voluntarily or involuntarily disposing of, or parting with,
13 money or property. In this case, the plaintiff claims that the
14 Renco Group, Inc. received transfers in the form of dividends
15 and stock redemptions from the debtor companies, that
16 defendants Ira Rennert and the trustees of the Rennert Trusts
17 were subsequent transferees, and that defendants Mike Legge,
18 Ron Thayer, Todd Ogaard, Lee Brown, and Howard Kaplan received
19 transfers from Magnesium Corporation that were made pursuant to
20 Net Worth Appreciation Agreements.

21 Plaintiff's contention is that these transfers are
22 avoidable because they are fraudulent under the bankruptcy
23 code. In this context, fraudulent doesn't mean that you must
24 find that the defendants intended to commit actual fraud or
25 deceive someone. Instead, there are three types of fraudulent

F2PMBUC1

Charge

1 transfers for which you may find defendants responsible under
2 the bankruptcy code. If the plaintiff has proven by a
3 preponderance of the evidence that any one of these types of
4 transfers occurred, you should find in favor of the plaintiff
5 on Count One.

6 First, a transfer is fraudulent under the law if (1)
7 the debtor received less than a reasonably equivalent value in
8 exchange for the transfer and (2) the debtor was insolvent on
9 the date that the transfer was made, or became insolvent as a
10 result of the transfer. In other words, if the value of what
11 the debtor received was materially less than the equivalent
12 value of what the debtor transferred away, and the fair market
13 value of the debtor's assets was less than its liabilities by
14 the time the transfer was complete, that was a fraudulent
15 transfer.

16 Second, a transfer is fraudulent under the law if (1)
17 the debtor received less than a reasonably equivalent value in
18 change for the transfer -- again, if the value of what it
19 received was materially less than the reasonably equivalent
20 value of what it transferred away and, (2) immediately after
21 the transaction, the debtor was left with an unreasonably small
22 amount of remaining capital for carrying on the debtor's
23 business for a reasonable period of time, considering what was
24 reasonably foreseeable at the time of the transfer.

25 Third, a transfer is fraudulent under the law if (1)

F2PMBUC1

Charge

1 the debtor received less than a reasonably equivalent value in
2 exchange for the transfer, and (2) the debtor intended or
3 believed that it would incur debts beyond its ability to pay as
4 they became due.

5 During the course of the trial, you have heard the
6 parties address these three types of fraudulent transfers as
7 three tests of insolvency. For the purposes of your task, that
8 description is just a different way of saying the same thing
9 that I have just explained to you. Accordingly, you need to
10 find by a preponderance of the evidence that only one of these
11 three types of transfers has occurred in order to find for the
12 plaintiff. You don't need to find that all of these types of
13 transfers occurred.

14 No. 8, definitions, insolvency and debt.

15 So that you can determine whether fraudulent transfers
16 were committed as described in plaintiff's first claim, I am
17 going to give you the legal definitions of some terms. The
18 definitions that I give you here should guide your
19 deliberations when determining whether the plaintiff has proven
20 his case. Some of these terms will also appear in other claims
21 that I will describe later in my instructions. Know that even
22 though I will only instruct you on the meanings of these terms
23 once, they have the same definition every time they appear in
24 my instructions, unless I specifically indicate otherwise.

25 The first term I will define is insolvency. An entity

F2PMBUC1

Charge

1 is insolvent or made insolvent at the time of transfer when the
2 sum of its debts is greater than the fair market value of all
3 of its assets. No rigid approach should be taken regarding the
4 fair valuation of a company within the context of a solvency
5 analysis, but rather you should consider the totality of the
6 circumstances. The fair value of a company's assets is
7 determined by the fair market value of the assets that could be
8 obtained if sold in a prudent manner by a willing seller to a
9 willing buyer with all relevant information within a reasonable
10 period of time to pay a company's debts. To make that
11 determination, you may consider any combination of valuation
12 methodologies presented to you during the course of the trial.
13 Based on the evidence presented by the parties, you should
14 determine the fair market value of those assets.

15 The definition of insolvency that I am giving you also
16 requires a determination of the sum of all of Magnesium
17 Corporation's and Renco Metals' debts. In the bankruptcy
18 context, a debt is defined as the amount of money that one will
19 be legally responsible to pay to other parties as a result of
20 legal rights to payment that those others have. This right to
21 payment can include amounts owed to individuals and entities
22 that have lent an entity money, as well as reasonably certain
23 potential legal liabilities, whether or not the entity has
24 actually been sued. You have heard the parties discuss
25 contingent liability at length during the trial, and I will

F2PMBUC1

Charge

1 instruct you on the meaning of contingent liability in a
2 moment. For now, you should know that if you find that MagCorp
3 or Renco Metals had a contingent liability, you should include
4 the amount of that contingent liability in the company's debts.

5 You must find whether insolvency existed at the time
6 of each transfer. In determining whether Magnesium Corporation
7 and Renco Metals were insolvent, you should consider the
8 companies' assets as they were appropriately valued at the time
9 of each transfer, not at the level they later turned out to be
10 valued. That is to say, just because Magnesium Corporation and
11 Renco Metals went bankrupt at some point after the transfers at
12 issue in this case does not determine that they were insolvent
13 at the time of each transfer. While the solvency of MagCorp
14 and Renco Metals must be determined as of the date of the
15 transfer, you may consider evidence from after that date of the
16 transfer only insofar as you conclude that it demonstrates the
17 existence of facts that were known or, through the exercise of
18 reasonable diligence, could have been known by the date of each
19 transfer. It is for you to decide both the value of the
20 companies' assets and the amount of their debts at the time of
21 the transfers in question.

22 No. 9, definition: Contingent liability.

23 As I just stated, I will also define the term
24 contingent liability which you have heard the lawyers use
25 throughout the trial.

F2PMBUC1

Charge

1 A contingent liability is one that although a person
2 or business is not required to pay it right now, there is a
3 reasonable probability that they will have to pay in the
4 future. They are liabilities that are contingent on a future
5 event occurring. For example, if someone has taken an action
6 that violates the law, any amount they may have to pay would be
7 a contingent liability if there is a reasonable probability
8 that a liability will be established in the future. In other
9 words, a contingent liability is a cost that is reasonably
10 foreseeable based on conduct that has already occurred.

11 It is not mere speculation, nor is it the result of
12 random, unforeseeable events. There is always a chance that
13 someone could have to pay for something that they could not
14 have expected, but that does not mean they have a contingent
15 liability. Contingent liabilities do not exist if there is not
16 a reasonable probability that the events triggering actual
17 liability will come to pass. Accordingly, contingent
18 liabilities only have value in proportion to the probability
19 that they will actually come to pass.

20 To determine the size of contingent liability, you
21 must first find the total amount of liability that a company
22 would take on if the event triggering that liability comes to
23 pass, and then reduce it by the probability that the liability
24 will actually come to pass. For example, if a contingent
25 liability would be for \$100, but there is only a 60 percent

F2PMBUC1

Charge

1 chance that someone would ever have to pay that liability, the
2 value of the contingent liability is calculated at \$60. If you
3 find that there is little or no chance that a contingent
4 liability would come to pass, you may value it as zero. If you
5 find that the likelihood that a contingent liability would come
6 to pass is certain, you may value it at 100 percent.

7 With this definition in mind, you should assess the
8 evidence that the parties offered as to the appropriate measure
9 of contingent liabilities.

10 The size of Magnesium Corporation's and Renco Metals'
11 contingent liabilities can then be factored into determining
12 whether the corporations were solvent. As I have already
13 instructed you, a corporation is solvent when its assets are
14 greater than its liabilities. Contingent liabilities are part
15 of the companies' overall liabilities for the purpose of
16 determining solvency.

17 No. 10, unreasonably small capital.

18 Of the three ways you can find liability for
19 fraudulent transfers in claim one, the second requires a
20 finding that the debtor corporations were left with an
21 unreasonably small amount of remaining capital for carrying on
22 the debtor's business for a reasonable period of time,
23 considering what was reasonably foreseeable at the time of the
24 transfer. A company has an unreasonably small amount of
25 capital if, though technically solvent, it is doomed to fail.

F2PMBUC1

Charge

1 It means that the companies were left in such a state that they
2 would be unable to sustain enough profit to continue
3 operations. While a company must be adequately capitalized, it
4 does not need resources sufficient to withstand any and all
5 setbacks.

6 You may consider a number of factors in determining
7 whether Magnesium Corporation and Renco Metals were left with
8 enough capital to survive after the transfers. These may
9 include the amount of extra capital the companies historically
10 kept on hand, the general amount of capital needed in the
11 magnesium production industry, and how the ratio of its
12 operations financed by the value of all of its stock compared
13 to the amount of debt it had taken on has changed since the
14 transfers. In addition, you may consider the reasonableness of
15 the company's financial projections and whether they were
16 prudent, not with hindsight, but at the time made.

17 The mere fact that the companies later went bankrupt
18 does not mean that they were left with an unreasonably small
19 amount of capital. Your task is to decide whether the amount
20 of capital remaining was reasonable at the time the transfers
21 were made, not with the benefit of hindsight. That is, you
22 must decide whether someone viewing the defendants' actions at
23 the time the transfers were made, and not knowing exactly what
24 would happen in the future, would decide that they acted
25 prudently in -- I am going to start that sentence again. That

F2PMBUC1

Charge

1 is, you must decide whether someone viewing the defendants'
2 actions at the time the transfers were made, and not knowing
3 exactly what would happen in the future, would decide that they
4 acted prudently in relation to the amount of capital left in
5 the businesses. While the adequacy of capital of MagCorp and
6 Renco Metals must be determined as of the date of the transfer,
7 you may consider evidence from after the date of the transfer
8 only insofar as you conclude that it demonstrates the existence
9 of facts that were known or, through the exercise of reasonable
10 diligence, could have been known by the date of the transfer.

11 No. 11, claim 2: Fraudulent conveyance, New York law.

12 I will now turn to plaintiff's second claim, which is
13 that defendants Rennert, Legge, Thayer, Ogaard, Brown, Kaplan,
14 the Renco Group, and the trustees of the Rennert Trust are
15 liable for fraudulent conveyances under Section 273 of New
16 York's debtor and creditor law. To establish a claim of fraud
17 conveyance, the plaintiff must show that:

18 1. The debtor corporation or corporations made a
19 conveyance to the defendants without fair consideration, and

20 2. The debtor corporation was insolvent when it made
21 the conveyance, or rendered insolvent because of the
22 conveyance, or was left with unreasonably small capital as a
23 result of the conveyance, or made the conveyance intending or
24 believing that it would incur debts beyond his ability to pay
25 as they came due.

F2PMBUC1

Charge

1 I will now further explain each of these elements of
2 the claim.

3 No. 12, fraudulent conveyance, element one, lack of
4 fair consideration.

5 The first element of a fraudulent conveyance claim is
6 that the conveyance was made without fair consideration. Fair
7 consideration has two components, an exchange of fair value and
8 good faith. So a conveyance made without fair consideration is
9 one where either the party receiving the conveyance did not
10 give fair value in exchange for what it received, or the party
11 receiving the conveyance was not acting in good faith.

12 New York law defines fair value as receiving a fair
13 equivalent amount of property, or satisfying a fair equivalent
14 amount of debt, in exchange for the property given. This does
15 not mean that the amount given on each side of the exchange
16 must be precisely the same. The values need only be roughly
17 equal to constitute fair value.

18 Fair value can also mean that the property was given
19 as part of an advance made in the present, or because of a debt
20 incurred in the past, and the amount of the advance given or
21 debt satisfied was not disproportionately small when compared
22 with the value of the property transferred.

23 Good faith means that the party receiving the transfer
24 acted honestly, fairly, and openly. A party may be acting in
25 good faith when it does not honestly believe that the actions

F2PMBUC1

Charge

1 it is taking are proper, if it intends to take unfair advantage
2 of others, or if it knows or intends that the actions will
3 hinder, delay, or defraud others.

4 Fraudulent conveyance, element 2, insolvency or
5 unreasonably small capital.

6 The second element that the plaintiff must establish
7 by a preponderance of the evidence is that the debtor
8 corporations, Magnesium Corporation of America and Renco
9 Metals, were insolvent at the time the conveyances were made,
10 or were left with unreasonably small capital as a result of the
11 conveyances, or intended or believed that they would incur
12 debts beyond their ability to pay as they came due as a result
13 of the transfers. I have already instructed you on the meaning
14 of insolvency, but for you to decide claim 2, I must instruct
15 you on its specific definition under New York law.

16 Under New York law, an entity is insolvent when the
17 present fair saleable value of its assets is less than the
18 amount that will be required to pay its probable liability on
19 its existing debt as they become absolute and matured. In
20 other words, a company is insolvent when the sum total of
21 assets is worth less than the total amount of liabilities that
22 the company faces, or its debts exceed the fair market value of
23 its property.

24 In determining whether Magnesium Corporation and Renco
25 Metals were insolvent, you should consider the companies'

F2PMBUC1

Charge

1 assets as they were appropriately valued at the time of the
2 transfers, not at the level they later turned out to be valued.
3 While the solvency of MagCorp and Renco Metals must be
4 determined as of the date of the transfer, you may consider
5 evidence from after the date of the transfer that demonstrates
6 the existence of facts that were known or, through the exercise
7 of reasonable diligence, could have been known by the date of
8 the transfer.

9 In determining whether the companies were left with
10 unreasonably small capital or debts that they intended or
11 believed they would not be able to pay as they came due, you
12 should apply the definitions I have already given to you.

13 If you determine by a preponderance of the evidence
14 that either Magnesium Corporation or Renco Metals was insolvent
15 at the time of transfers at issue in this case were made, or
16 that they were rendered insolvent as a result of the transfers,
17 then the plaintiff has satisfied his burden on this element.

18 (Continued on next page)
19
20
21
22
23
24
25

F2p4buc2

Charge

1 THE COURT: Number 14. Claim Three: Aiding and
2 Abetting Fraudulent Conveyance.

3 The plaintiff's third claim is that defendant Ira
4 Rennert aided and abetted fraudulent conveyances made by other
5 defendants. You will consider this claim only if you determine
6 that a fraudulent conveyance occurred.

7 A person aids and abets a fraudulent conveyance when
8 he knowingly participated in the transfer to another person who
9 commits a fraudulent transfer. A person does not have to
10 actually cause or make the fraudulent transfer to be liable
11 under an aiding and abetting theory. Liability as an aider and
12 abettor is, in fact, premised on the idea that the person
13 accused of aiding and abetting a violation of the law was not
14 the same person who actually violated the law.

15 To establish that a person aided and abetted another
16 person's fraudulent conveyances, the plaintiff must demonstrate
17 three things by a preponderance of the evidence.

18 First, the plaintiff must establish that fraudulent
19 conveyances were committed by a person or entity other than the
20 defendant accused in this claim. If you find that the
21 fraudulent conveyances alleged in the previous claim were
22 committed, you should consider this element satisfied. If you
23 find that no fraudulent conveyances were committed, you should
24 consider this claim no further and find in favor of the
25 defendants on this claim.

F2p4buc2

Charge

1 If you do find that fraudulent conveyances were
2 committed, you must next consider whether the plaintiff has
3 established that defendant Rennert knowingly induced or
4 participated in those fraudulent conveyances. Knowing
5 participation requires that a person have actual knowledge of
6 the wrongdoing -- here, that the disputed transfers were
7 fraudulent conveyances. A person knowingly induces or
8 participates in fraudulent conveyances when he provides
9 substantial assistance to the person or people who commit the
10 actual fraudulent conveyances. The question for you, then, is
11 whether defendant Rennert affirmatively assisted, helped to
12 conceal, or otherwise enabled fraudulent conveyances to occur.

13 Finally, to be liable for aiding and abetting
14 fraudulent conveyances, the conveyances must have caused damage
15 to the debtor corporations.

16 Fraudulent Transfer or Fraudulent Conveyance:
17 Damages.

18 If you find in plaintiff's favor on Claim One, Claim
19 Two, and/or Claim Three -- that is, for fraudulent transfer,
20 fraudulent conveyance, or aiding and abetting fraudulent
21 conveyance -- you must next determine the full amount of the
22 fraudulent transfers or conveyances made. You should include
23 in this amount all of the transfers that you find to be
24 fraudulent. If there are any transfers or conveyances
25 plaintiff has alleged that you find not to be fraudulent, you

F2p4buc2

Charge

1 should not include the amount of those transfers or conveyances
2 in this calculation. You must indicate the total amount of
3 each fraudulent transfer or conveyance, if any, in the
4 appropriate place on your verdict sheet.

5 Number 16. Claim Four: Breach of Fiduciary Duty.

6 The plaintiff's fourth claim is that defendants
7 Rennert, D'Atri, Sadlowski, Fay, Ryan, Legge, Thayer, Ogaard,
8 Brown, and Kaplan breached their fiduciary duties to Magnesium
9 Corporation and Renco Metals. You will reach this claim only
10 if you conclude that MagCorp or Renco Metals was insolvent or
11 was inadequately capitalized as to a particular transfer. I
12 will now instruct you on fiduciary duties owed by corporate
13 officers and directors to their corporations.

14 First, a corporate director or officer has a fiduciary
15 duty of loyalty. The duty of loyalty requires that the
16 officers and directors act in the best interest of the
17 corporation and not act in any manner contrary to those
18 interests.

19 Second, a corporate debtor or officer has a fiduciary
20 duty of care. This is the duty to perform their functions and
21 responsibilities in a manner they reasonably believed to be in
22 the best interest of those corporations, and with the care that
23 ordinarily prudent persons would reasonably be expected to
24 exercise in a like position and under similar circumstances.
25 The duty of care has been described as the duty to act on an

F2p4buc2

Charge

1 informed basis, and is violated if the plaintiff proves that
2 the officers and director failed to inform themselves fully and
3 in a deliberate manner. The plaintiff claims that the
4 defendants breached -- that is, acted in violation of -- at
5 least one of their fiduciary duties with respect to the
6 dividend payments, stock redemptions, and the net worth
7 appreciation payments that they knew would leave the
8 corporations insolvent or with inadequate capital.

9 The duty of care is satisfied when a director or
10 officer exercises a good faith effort to be informed and
11 exercises appropriate judgment for the benefit of the
12 corporation in the performance of his responsibilities. Acting
13 in good faith means acting honestly with a sincere intention to
14 deal fairly with others. If so, you should find that the
15 officer or director did not violate his fiduciary duties.

16 When considering whether there was a breach of
17 fiduciary duty, you should consider each defendant against whom
18 this claim is raised separately. Generally, it is the
19 plaintiff's burden to show by a preponderance of the evidence
20 that a particular defendant committed a breach of the fiduciary
21 duty. However, if the plaintiff has proven by a preponderance
22 of the evidence that an officer or director is interested in a
23 transaction, the burden will shift to that defendant. An
24 officer or director is interested in a transaction if he either
25 (1) stands on both sides of the transaction, or (2) expects to

F2p4buc2

Charge

1 receive a personal financial benefit from the transaction.

2 Each defendant that is the subject of a claim for
3 breach of fiduciary duty with respect to a conveyance that the
4 plaintiff seeks to recover, and who was interested in the
5 conveyance as defined below, has the burden of establishing
6 that the conveyance was entirely fair to the entity (MagCorp or
7 Renco Metals) of which the defendant was an officer or
8 director.

9 The entire fairness standard has two parts: fair
10 dealing and fair price.

11 Fair dealing is concerned with how a conveyance was
12 initiated, structured, negotiated, disclosed, and how the
13 approval of the conveyance was obtained. Fair price is
14 concerned with the economic and financial considerations of the
15 conveyance, including all relevant factors, assets, market
16 value, earnings, future prospects, and any other elements that
17 affect the intrinsic or inherent value of a company's stock.

18 If you find that the defendants did not breach their
19 fiduciary duty to MagCorp or Renco Metals, you need proceed no
20 further. If you find that the defendants did breach their
21 fiduciary duty, you must then decide whether that breach was a
22 substantial factor in causing Magnesium Corporation and Renco
23 Metals to sustain damages. If you find that it was not a
24 substantial factor in causing these corporations to sustain
25 damages, you need proceed no further. If you find that the

F2p4buc2

Charge

1 defendants' breach was a substantial factor in causing the
2 corporations to sustain damages, you should find in favor of
3 the plaintiffs on this claim. You will then proceed to
4 determining damages, as I will discuss in a moment.

5 There are two specific companies that plaintiff
6 alleges specific defendants owed fiduciary duties to:

7 As director of MagCorp and Renco Metals: (1) Ira
8 Rennert.

9 Individual defendants as officers of MagCorp:
10 (1) Michael Legge; (2) Ron Thayer; (3) Howard Kaplan; (4) Todd
11 Ogaard; (5) Lee Brown; (6) Michael Ryan (from September 25,
12 1998 to June 24, 2002); Dennis Sadlowski (from September 25,
13 1998 to June 24, 2002).

14 Individual defendants as officers of Renco Metals:
15 (1) Roger Fay; (2) Justin D'Atri; (3) Michael Ryan (from
16 September 25, 1998 to June 24, 2002) (4) Dennis Sadlowski (from
17 September 25, 1998 to June 24, 2002).

18 Number 17. Claim Five: Aiding and Abetting Breach of
19 Fiduciary Duty.

20 The plaintiff's fifth claim is that defendants
21 Rennert, D'Atri, Fay, Sadlowski, Ryan, Legge, Thayer, Ogaard,
22 Brown, Kaplan, and The Renco Group aided and abetted a breach
23 of fiduciary duty. To establish that those defendants aided
24 and abetted a breach of fiduciary duty, the plaintiff must
25 demonstrate by a preponderance of the evidence of the evidence

F2p4buc2

Charge

1 that (1) There was a breach of fiduciary duty; (2) That the
2 defendant at issue knowingly induced or participated in that
3 breach of fiduciary duty; and

4 (3) That Magnesium Corporation and Renco Metals
5 suffered damage as a result of the breach of fiduciary duty.

6 If you find that the defendants named in the
7 plaintiff's fourth claim for breach of fiduciary duty did, in
8 fact, commit a breach of fiduciary duty, then the first element
9 of the plaintiff's aiding and abetting a breach of fiduciary
10 duty is satisfied. Conversely, if when deciding the
11 plaintiff's third claim, you decide that none of the defendants
12 committed a breach of fiduciary duty, you must find in favor of
13 the defendants on the plaintiff's claim for aiding and abetting
14 a breach of fiduciary duty.

15 If you find that there was an underlying breach of
16 fiduciary duty, you must next decide whether the defendants
17 knowingly induced or participated in that breach of fiduciary
18 duty. A person knowingly induces or participates in a breach
19 of fiduciary duty when he provides substantial assistance to
20 the person or people who commit the actual breach of fiduciary
21 duty. The question for you, then, is whether the defendants
22 affirmatively assisted, helped to conceal, or otherwise enabled
23 a breach of fiduciary duty to occur.

24 If you find that a defendant substantially assisted a
25 breach of fiduciary duty, you do not need to find that he

F2p4buc2

Charge

1 intended to harm Magnesium Corporation or Renco Metals by
2 aiding and abetting the breach of fiduciary duty; you need only
3 find that he had actual knowledge of the breach of that duty
4 when he induced or participated in it.

5 Finally, to be liable for aiding and abetting a breach
6 of fiduciary duty, the underlying breach must have caused
7 damage to the debtor corporation. Such damage can include
8 rendering them insolvent.

9 If you find that the plaintiff has established all
10 three elements of aiding and abetting a breach of fiduciary
11 duty by a preponderance of the evidence, you must find in his
12 favor.

13 Number 18. Breach of Fiduciary Duty and Aiding and
14 Abetting Breach of Fiduciary Duty: Damages.

15 If you find that a defendant committed a breach of his
16 fiduciary duties as alleged in plaintiff's fourth claim, or
17 aided and abetted a breach of fiduciary duty, as alleged in
18 plaintiff's fifth claim, and that the breach was a substantial
19 factor in causing Magnesium Corporation or Renco Metals to
20 sustain damages, you must then determine the amount of damages
21 that should be awarded to the plaintiff. In that event, you
22 will award the plaintiff such an amount as you find to be the
23 actual damages sustained by way of the dividend payments, stock
24 redemptions, and net worth appreciation agreements.

25 Number 19. Breach of Fiduciary Duty and Aiding and

F2p4buc2

Charge

1 Abetting Breach of Fiduciary Duty; Punitive Damages. If you
2 decide to award compensatory damages to the plaintiff for a
3 breach of fiduciary duty or aiding and abetting breach of
4 fiduciary duty, you must determine whether a defendant who has
5 been found liable is also liable for punitive damages.

6 Punitive damages are different from compensatory
7 damages. Compensatory damages are awarded to compensate the
8 plaintiff for the injury suffered. Punitive damages, on the
9 other hand, are awarded in addition to compensatory damages.

10 You may award punitive damages to punish a party for
11 outrageous conduct and to deter a party and others like him
12 from engaging in similar conduct in the future. To award
13 punitive damages, you must find by a preponderance of the
14 evidence that the defendants that you have found breached their
15 fiduciary duty engaged in willful or wanton conduct and acted
16 maliciously for the purpose of injuring the corporation.
17 Punitive damages cannot be awarded for mere inadvertence,
18 mistake, errors of judgment and the like which constitute
19 ordinary negligence.

20 Intentional conduct means it is the person's conscious
21 object to engage in conduct of that nature. This standard
22 requires that the defendant first foresee that his conduct
23 threatens a particular harm to another.

24 The law provides no fixed standards for the amount of
25 punitive damages.

F2p4buc2

Charge

1 In determining any award of punitive damages, you may
2 consider the nature of the defendants' conduct and the degree
3 to which the conduct was reprehensible. Finally, you may
4 assess an amount of damages that will deter the defendant and
5 others like him from similar conduct in the future. You may
6 consider the defendants' financial condition when evaluating
7 deterrence. Any award of punitive damages must bear a
8 reasonable relationship to the plaintiff's compensatory
9 damages. If you find that the plaintiff is entitled to an
10 award of punitive damages, state the amount of punitive damages
11 separately on the verdict form.

12 Number 20. Claim 6A: Unlawful Payment of Dividends.

13 Plaintiff's sixth claim is that the defendant Rennert
14 made unlawful dividend payments and unlawful stock redemptions.
15 You will reach this claim only if you conclude that there has
16 been a fraudulent transfer or fraudulent conveyance. Under the
17 law, a company may declare a dividend out of its surplus, or if
18 there is no surplus, out of its net profits from the year in
19 which the dividend was declared or the prior fiscal year.

20 A company's surplus is defined as the amount by which
21 its net assets exceed the value of its capital. Net assets,
22 much like solvency, is defined as the value of a company's
23 assets minus the amount of its liabilities. A company may
24 determine for itself the amount of its assets that constitute
25 capital, and you should consider the evidence presented by the

F2p4buc2

Charge

1 parties to determine the amount of Magnesium Corporation's and
2 Renco Metals' assets that should be considered capital.

3 If you find that the debtor companies did not have a
4 surplus, you should next consider whether they had net profits
5 for the year in which the dividend was declared, or the prior
6 fiscal year. Net profits are the amount by which the money a
7 company earned in a given year exceeded its costs in that year.
8 A company that does not have a surplus may still pay dividends
9 out of its net profits.

10 Note that a company may not pay a dividend if it is
11 insolvent when it pays the dividend or would be rendered
12 insolvent by paying the dividend. Insolvency here has the same
13 definition I gave to you earlier in instruction number 8.

14 Note, also, that when deciding whether to pay a
15 dividend, a corporate director like defendant Rennert is not
16 bound to strictly follow the corporation's balance sheet when
17 deciding whether the corporation may declare a dividend. The
18 touchstone, instead, is whether the defendant was acting in
19 good faith. Directors have reasonable latitude to depart from
20 the balance sheet to calculate surplus, so long as they
21 evaluate assets and liabilities in good faith, on the basis of
22 acceptable data, by methods that they reasonably believe
23 reflect present values, and arrive at a determination of the
24 surplus that is not so far off the mark as to constitute bad
25 faith.

F2p4buc2

Charge

1 To demonstrate that Mr. Rennert made unlawful dividend
2 payments and unlawful stock redemptions, the plaintiff must
3 show, by a preponderance of the evidence, that defendant
4 Rennert willfully or negligently caused a dividend to be paid
5 or a stock redemption to occur when Magnesium Corporation and
6 Renco Metals either had no surplus or did not have a net profit
7 in the fiscal year the dividend was declared or the previous
8 year. I will explain these elements in more detail.

9 First, you must determine whether Magnesium
10 Corporation and Renco Metals were properly paid dividends out
11 of a surplus or net profits, and that the payment did not
12 exceed the amount of the companies' surplus or net profits.
13 You must also find that the companies were solvent at the time
14 the dividends were paid. Remember that this involves
15 determining whether Mr. Rennert valued the company's surplus in
16 good faith and based on reasonable methods, and not whether he
17 was strictly correct.

18 Second, if you find that Magnesium Corporation and
19 Renco Metals were insolvent at the time that the dividends were
20 paid and the stock redemptions were made, or that they did not
21 have the required surplus or net profits to pay the dividends,
22 you must also determine whether defendants Rennert and The
23 Renco Group were acting willfully or negligently, when they
24 paid dividends or made the stock redemptions. Willfulness and
25 negligence here have the same meaning that you would use in

F2p4buc2

Charge

1 ordinary life.

2 A person's conduct is negligent if that person fails
3 to exercise ordinary care. It is a failure to use that degree
4 of care that a reasonably prudent person would have used under
5 the same circumstances. Negligence may arise from doing an act
6 that a reasonably prudent person would not have done under the
7 circumstances.

8 Willful conduct is more than negligence; it describes
9 when a person intentionally acts, knowing that his action will
10 probably result in injury or damage.

11 Accordingly, if you find that the plaintiff has proven
12 by a preponderance of the evidence that dividends were paid
13 while Magnesium Corporation and Renco Metals were insolvent,
14 and that such actions were taken willfully or negligently on
15 the part of defendant Rennert, you should find that defendant
16 Rennert made unlawful dividend payments, and proceed to
17 evaluate the affirmative defense on which I will instruct you
18 in a moment.

19 Number 21. Claim 6B: Unlawful Stock Redemptions.

20 A second part of the plaintiff's sixth claim is that
21 defendant Rennert made unlawful stock redemptions. You will
22 reach this claim only if you conclude that there has been a
23 fraudulent transfer or fraudulent conveyance. Under the law, a
24 corporation may purchase shares of its own stock only out of
25 surplus funds, as I have defined them for you. Accordingly,

F2p4buc2

Charge

1 you must determine whether defendant Rennert made stock
2 redemptions in an amount exceeding Magnesium Corporation's and
3 Renco Metals' surplus. If you find that the plaintiff has
4 proven by a preponderance of the evidence that he did, you
5 should find that defendant Rennert made unlawful stock
6 redemptions, and proceed to evaluate the affirmative defense on
7 which I will instruct you now.

8 Number 22. Claims 6A and 6B: Good Faith Reliance
9 Defense.

10 Defendant Rennert has asserted a defense of good faith
11 reliance to the claims of unlawful dividends and stock
12 redemptions, as described in the previous two instructions. I
13 earlier instructed you that plaintiff must meet the burden of
14 proof with respect to establishing his claims. However, with
15 respect to this affirmative defense, it is the defendants'
16 burden to prove by a preponderance of the evidence.

17 Under the law, a corporate director like Mr. Rennert
18 is fully protected from liability on claims 6A and 6B (for
19 unlawful dividends and unlawful stock redemptions) when he
20 relies in good faith upon the records of the corporation and
21 upon information, opinions, reports, or statements presented to
22 the corporation by any of its officers or employees, or
23 committees of the board of directors.

24 He is also protected from liability on claims 6A and
25 6B when relying on information presented to him by any other

F2p4buc2

Charge

1 person as to matters the director reasonably believes are
2 within such person's professional or expert competence, and who
3 has been selected with reasonable care by or on behalf of the
4 corporation. This protection applies to information as to the
5 value and amount of the assets, liabilities and/or net profits
6 of the corporation or any other facts pertinent to the exercise
7 and amount of the surplus or other funds from which dividends
8 might properly be declared and paid, or with which the
9 corporation's stock might properly be purchased or redeemed.

10 Accordingly, if you find that defendant Rennert relied
11 in good faith on these matters when deciding whether to declare
12 a dividend or redeem stock, you should find in his favor on the
13 claims of unlawful dividend and unlawful stock redemption
14 against him. It is defendant Rennert's burden to prove good
15 faith reliance by a preponderance of the evidence.

16 Number 23. Claim 6C: Shareholder Liability for
17 Unlawful Dividends.

18 Plaintiff's third allegation with respect to his sixth
19 claim is that defendant The Renco Group, Inc., received the
20 unlawful dividends alleged. If you find that there was no
21 unlawful dividend, you should not consider this claim further.

22 Under the law, a shareholder is liable for and must
23 repay unlawful dividends if it knew the facts indicating that
24 the dividend was unlawful when it received the dividend.

25 Accordingly, if you find by a preponderance of the evidence

F2p4buc2

Charge

1 that defendant The Renco Group, Inc., knew the facts indicating
2 that the dividends it received were unlawful according to the
3 instructions I have just given you, you should find in favor of
4 the plaintiff on this claim.

5 Number 24. Unlawful Dividends and Unlawful Stock
6 Redemptions: Damages.

7 If you find that the payment or receipt of unlawful
8 dividends, as alleged in plaintiff's claims 6A and 6B, or the
9 unlawful stock redemptions alleged in plaintiff's claim 6C
10 occurred, you must then determine the amount of damages that
11 should be awarded to the plaintiff on those claims. If you
12 find for the plaintiff on any of these claims, you shall then
13 find the full amount of the dividend unlawfully paid, or to the
14 full amount unlawfully paid for the purchase or redemption of
15 the corporation's stock, and indicate that amount in the
16 appropriate place on the verdict form.

17 Number 25. Claim Seven: Unjust Enrichment.

18 The plaintiff's seventh claim is that defendants IRA
19 Rennert and Trustees of the Rennert Trusts were unjustly
20 enriched at Magnesium Corporation's and Renco Metals' expenses.
21 The defendants deny these claims, and contend that Mr. Rennert
22 and the Trustees of the Rennert Trusts did not receive any
23 direct benefits at the expense of Magnesium Corporation or
24 Renco Metals, and that Magnesium Corporation and Renco Metals
25 were not harmed by any of those defendants' actions.

F2p4buc2

Charge

1 Unjust enrichment occurs when one person or entity has
2 obtained money, property, or a direct benefit from another
3 person or entity that the recipient is not entitled to receive
4 and under such circumstances that, in fairness and good
5 conscience, the money, property or direct benefit should not be
6 retained. In those circumstances, the law requires that person
7 who received the direct benefit to repay, return the property
8 to, or compensate the other person.

9 The plaintiff has the burden of proving by a
10 preponderance of the evidence that defendant Rennert and the
11 Rennert Trusts received a direct benefit from the debtor
12 companies, and that the debtor companies were harmed as a
13 result. If the plaintiff has not proven to you that it is more
14 likely than not that the defendants received a direct benefit
15 from the debtor companies, that it would be against fairness
16 and good conscience for Mr. Rennert or the Rennert Trusts to
17 retain that direct benefit, and that the debtor companies were
18 harmed because they gave that direct benefit to the defendants,
19 you must find for the defendants on this claim. If you decide
20 that the plaintiff has proven each of those elements, you will
21 find the defendants liable to the plaintiff and you will go on
22 to consider the value of the direct benefit that the defendants
23 obtained.

24 Your task with regard to this claim is to make three
25 findings. First, you must decide whether defendants Rennert

F2p4buc2

Charge

1 and the Rennert Trusts received a direct benefit from the
2 debtor companies. If you find that they did not receive a
3 direct benefit, you need proceed no further with the claim. If
4 you find they did receive a direct benefit, you must determine
5 whether the debtor companies were harmed by conveying this
6 direct benefit. If you find that they were, you must find in
7 favor of the plaintiff on this claim and will now consider
8 damages. If you find that the debtor companies were not harmed
9 by conveying this direct benefit, you must find in favor of the
10 defendants.

11 Number 26. Unjust Enrichment: Damages.

12 If you find in the plaintiff's favor on claim seven
13 for unjust enrichment, you must next determine the amount of
14 damages that should be awarded to the plaintiff on this claim.
15 To do so, you must determine the value of the direct benefit
16 conferred on the defendants by the debtor companies. On your
17 verdict sheet, the amount of damages you indicate should be
18 equal to the value of the direct benefit that was directly
19 conferred by the defendants. It is the plaintiff's burden to
20 prove this amount by a preponderance of the evidence.

21 Number 27. Agreed Instruction Regarding Ira Rennert's
22 Wealth.

23 You have heard testimony about Mr. Rennert's wealth.
24 This evidence has been admitted for a single, limited purpose,
25 and I want to explain to you the sole basis on which you should

F2p4buc2

Charge

1 consider this evidence.

2 Mr. Rennert's wealth has no bearing on any issue in
3 this case. The fact that he is wealthy is irrelevant to this
4 case, and it does not make it more or less likely that he or
5 any other defendant is liable for any claim.

6 Mr. Buchwald presented evidence regarding the property
7 owned by Blue Turtles Inc. for the exclusive purpose of being
8 used by Mr. Rennert and his family. That evidence is only
9 relevant to Mr. Buchwald's contention that the proceeds of the
10 dividends paid by Renco Metals to The Renco Group, Inc.
11 benefited Mr. Rennert personally.

12 If you find that Mr. Buchwald has proven that dividend
13 proceeds were used in part to purchase land, you may consider
14 this evidence in assessing what, if any, benefit Mr. Rennert
15 personally received.

16 If you find that Mr. Buchwald has failed to prove that
17 the proceeds of the dividends were used to purchase land, you
18 should disregard all evidence about the land and Mr. Rennert's
19 wealth. In that case, this evidence should play no role in
20 your deliberations.

21 Number 28. Nature of Evidence.

22 The evidence in this case is the sworn testimony of
23 witnesses, the exhibits received in evidence, stipulations, and
24 judicially noticed facts.

25 Actually, before I continue here, let's just take a

F2p4buc2

Charge

1 stretching break for a moment.

2 (Pause)

3 Number 28. Nature of Evidence.

4 The evidence in this case is the sworn testimony of
5 witnesses, the exhibits received in evidence, stipulations, and
6 judicially noticed facts.

7 By contrast, the questions of the lawyers are not to
8 be considered by you as evidence. It is the witnesses' answers
9 that are evidence, not the questions. At times, a lawyer may
10 have incorporated into a question a statement which assumed
11 certain facts to be true, and asked the witness if the
12 statement was true. If the witness denied the truth of the
13 statement, and if there is no direct evidence in the record
14 proving that assumed fact to be true, you may not consider it
15 to be true simply because it was contained in the lawyer's
16 question.

17 Testimony that has been stricken or excluded is not
18 evidence and may not be considered by you in rendering your
19 verdict. Also, if certain testimony was received for a limited
20 purpose -- such as for the purpose of assessing a witness's
21 credibility -- you must follow the limiting instructions I have
22 given.

23 Arguments by lawyers are not evidence, because the
24 lawyers are not witnesses. What they have said to you in their
25 opening statements and in their summations is intended to help

F2p4buc2

Charge

1 you understand the evidence to reach your verdict. However, if
2 your recollection of the facts differs from the lawyers'
3 statements, it is your recollection which controls.

4 To constitute evidence which may be considered by you,
5 exhibits must be received in evidence. Exhibits marked for
6 identification but not admitted are not evidence, nor are
7 materials brought forth only to refresh a witness's
8 recollection.

9 Finally, statements which I may have made concerning
10 the quality of the evidence do not constitute evidence.

11 It is for you alone to decide the weight, if any, to
12 be given to the testimony you have heard and the exhibits you
13 have seen.

14 Number 29. Direct and Circumstantial Evidence.

15 There are two types of evidence that you may properly
16 use in reaching your verdict. One type of evidence is direct
17 evidence. One kind of direct evidence is a witness's testimony
18 about something the witness knows by virtue of his or her own
19 senses -- something the witness has seen, felt, touched, or
20 heard. Direct evidence may also be in the form of an exhibit.
21 The other type of evidence is circumstantial evidence.

22 Circumstantial evidence is evidence that tends to
23 prove one fact by proof of other facts. There is a simple
24 example of circumstantial evidence that is often used in this
25 courthouse.

F2p4buc2

Charge

1 Assume that when you came into the courthouse this
2 morning the sun was shining and it was a nice day. Assume that
3 the courtroom blinds are drawn and you cannot look outside. As
4 you are sitting here, someone walks in with an umbrella that is
5 dripping wet. Somebody else then walks in with a raincoat that
6 is also dripping wet.

7 Now, you cannot look outside the courtroom because the
8 blinds are drawn and you cannot see whether or not it is
9 raining. So you have no direct evidence of that fact. But on
10 the combination of the facts that I have asked you to assume,
11 it would be reasonable and logical for you to conclude that
12 between the time you arrived at the courthouse and the time
13 these people walked in, it had started to rain.

14 That is all there is to circumstantial evidence. You
15 infer on the basis of reason and experience and common sense
16 from an established fact the existence or the nonexistence of
17 some other fact. Many facts, such as a person's state of mind,
18 can only rarely be proved by direct evidence. Circumstantial
19 evidence is of no less value than direct evidence; the law
20 makes no distinction between direct and circumstantial
21 evidence, but simply requires that you, the jury, decide the
22 facts in accordance with the preponderance of all the evidence,
23 both direct and circumstantial.

24 Number 30. Inferences.

25 During the trial you have heard the attorneys use the

F2p4buc2

Charge

1 term "inference," and in their arguments they have asked you to
2 infer, on the basis of your reason, experience, and common
3 sense, from one or more established facts, the existence of
4 some other fact.

5 An inference is not a suspicion or a guess. It is a
6 reasoned, logical conclusion that a disputed fact exists on the
7 basis of another fact which has been shown to exist.

8 There are times when different inferences may be drawn
9 from facts, whether proved by direct or circumstantial
10 evidence. The plaintiff asks you to draw one set of
11 inferences, while the defense asks you to draw another. It is
12 for you, and you alone, to decide what inferences you will
13 draw.

14 The process of drawing inferences from facts in
15 evidence is not a matter of guesswork or speculation. An
16 inference is a deduction or conclusion which you, the jury, are
17 permitted to draw -- but not required to draw -- from the facts
18 which have been established by either direct or circumstantial
19 evidence. In drawing inferences, you should exercise your
20 common sense.

21 So, while you are considering the evidence presented
22 to you, you are permitted to draw, from the facts which you
23 find to be proven, such reasonable inferences as would be
24 justified in light of your experience.

25 Number 31. Credibility of Witnesses.

F2p4buc2

Charge

1 Now for the important subject of evaluating testimony.
2 How do you evaluate the credibility or believability of the
3 witnesses? The answer is that you use your plain common sense.
4 Common sense is your greatest asset as a juror. You should ask
5 yourselves, did the witness impress you as honest, open, and
6 candid? Or did the witness appear evasive or as though the
7 witness were trying to hide something? How responsive was the
8 witness to the questions asked on direct examination and on
9 cross-examination?

10 If you find that a witness is intentionally telling a
11 falsehood, such a finding is always a matter of importance that
12 you should weigh carefully. If you find that any witness has
13 lied under oath at this trial, you should view the testimony of
14 such a witness cautiously and weigh it with great care. It is,
15 however, for you to decide how much of the witness's testimony,
16 if any, you wish to believe. Few people recall every detail of
17 every event precisely the same way. A witness may be
18 inaccurate, contradictory, or even untruthful in some respects
19 and yet entirely believable and truthful in other respects. It
20 is for you to determine whether such inconsistencies are
21 significant or inconsequential, and whether to accept or reject
22 all or to accept some and reject the balance of the testimony
23 of any witness.

24 On some occasions during the trial, witnesses were
25 asked to explain an apparent inconsistency between testimony

F2p4buc2

Charge

1 offered at this trial and previous statements made by the
2 witness. It is for you to determine whether a prior statement
3 was inconsistent, and if so, how much (if any) weight to give
4 to an inconsistent statement in assessing the witness's
5 credibility at trial. You may consider evidence of a prior
6 inconsistent statement by a witness who is not a party only
7 insofar as it relates to the witness's credibility. You may
8 not consider it as evidence of a defendant's liability, except
9 for statements that have been received in evidence. You may
10 consider evidence of a party's prior inconsistent statement for
11 whatever light you find it sheds on the issues in this case.

12 You are not required to accept testimony even though
13 the testimony is uncontradicted and the witness's testimony is
14 not challenged. You may decide because of the witness's
15 bearing or demeanor, or because of the inherent improbability
16 of the testimony, or for other reasons sufficient to yourselves
17 that the testimony is not worthy of belief. On the other hand,
18 you may find, because of a witness's bearing and demeanor and
19 based upon your consideration of all the other evidence in this
20 case that the witness is truthful.

21 In evaluating the credibility of the witnesses, you
22 should take into account any evidence that a witness may
23 benefit or suffer in some way from the outcome of the case.
24 Such interest in the outcome creates a motive to testify
25 falsely and may sway a witness to testify in a way that

F2p4buc2

Charge

1 advances his or her own interests. Therefore, if you find that
2 any witness whose testimony that you are considering may have
3 an interest in the outcome of this trial, then you should bear
4 that factor in mind when evaluating the credibility of his
5 testimony, and accept it with great care.

6 Keep in mind, though, that it does not automatically
7 follow that testimony given by an interested witness is to be
8 disbelieved. There are many people who, no matter what their
9 interest in the outcome of the case may be, would not testify
10 falsely. It is for you to decide, based on your own
11 perceptions and common sense, to what extent, if at all, the
12 witness's interest has affected her or his testimony.

13 Thus, there is no magic formula by which you can
14 evaluate testimony. You bring to this courtroom all your
15 experience. You determine for yourselves in many circumstances
16 the reliability of statements that are made by others to you
17 and upon which you are asked to rely and act. You may use the
18 same tests here that you use in your everyday lives. Among the
19 factors you may consider are the witness's intelligence; the
20 ability and opportunity the witness had to see, hear, or know
21 about the things that the witness testified about; the
22 witness's memory; any interest, bias or prejudice the witness
23 may have; the manner of the witness while testifying; and the
24 reasonableness of the witness's testimony in light of all of
25 the evidence in this case.

F2p4buc2

Charge

Number 32. Deposition Testimony.

Some of the testimony before you is in the form of depositions which have been received in evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or an adverse party under oath before a stenographer prior to trial. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition and received in evidence during the trial according to the same standards as you would use to evaluate the testimony of a witness given at trial.

Number 33. Expert Witnesses.

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, expertise and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or to reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion

F2p4buc2

Charge

1 testimony whatever weight, if any, you find it deserves in
2 light of all of the evidence in this case. You should not,
3 however, accept opinion testimony merely because I allowed the
4 witness to testify concerning his or her opinion. Nor should
5 you substitute it for your own reason, judgment, and common
6 sense. The determination of the facts in this case rests
7 solely with you.

8 Number 34. Conflicting Expert Testimony.

9 You have heard testimony of expert witnesses who have
10 been called by both sides to give their opinions on several
11 important issues in the case.

12 The witnesses who testified in this case did so in
13 order to assist you in reaching a decision on the issues before
14 you.

15 The testimony of these witnesses is in conflict. They
16 disagree. You must remember that you are the sole trier of the
17 facts and their testimony relates to a question of fact -- so
18 it is your job to resolve the disagreement.

19 The way you resolve the conflict between these
20 witnesses is the same way that you decide other fact questions
21 and the same way you decide whether to believe ordinary
22 witnesses. In addition, since they gave their opinions, you
23 should consider the soundness of each opinion, reasons for the
24 opinion, and the witness's motive, if any, for testifying.

25 You may give the testimony of each of these witnesses

F2p4buc2

Charge

1 such weight, if any, that you think it deserves in the light of
2 all of the evidence. You should not permit a witness's opinion
3 testimony to be a substitute for your own reason, judgment, and
4 common sense.

5 You may reject the testimony of any opinion witness in
6 whole or in part, if you conclude the reasons given in support
7 of an opinion are unsound or, if you, for others reasons, do
8 not believe the witness. The determination of the facts in
9 this case rests solely with you.

10 Number 35. Stipulations.

11 Stipulations have been entered into relating to
12 various facts in this case. A stipulation is an agreement
13 between parties as to what certain facts were or what the
14 testimony would be if certain people testified before you. The
15 stipulations are the same for your purposes as the presentation
16 of live testimony. You should consider the weight to be given
17 such evidence just as you would any other evidence.

18 Number 36. Right to See Exhibits and Hear Testimony.

19 You are about to go into the jury room and begin your
20 deliberations. The exhibits will be sent back to you in the
21 jury room. If you want any of the testimony read back to you,
22 you may also request that. Please remember that it is not
23 always easy to locate what you might want, so be as specific as
24 you possibly can be in requesting portions of the testimony,
25 and be patient.

F2p4buc2

Charge

1 Your requests for exhibits or testimony -- in fact,
2 any communications with the Court -- should be made in writing,
3 signed by your foreperson -- I will explain that in a moment --
4 and given to one of the marshals who will be safeguarding your
5 deliberations. In any event, do not tell me or anyone else how
6 the jury stands on any issue until after a unanimous verdict is
7 reached.

8 Number 37. Juror Note-Taking.

9 I remind you that any notes you may have taken are
10 simply to be used solely to assist you and are not to
11 substitute for your recollection of the evidence in the case.
12 The fact that a particular juror has taken notes entitles that
13 juror's views to no greater weight than those of any other
14 juror and your notes are not to be shown to any other juror
15 during your deliberations. If, during your deliberations, you
16 have any doubt as to any of the testimony, you are permitted to
17 request that the official trial transcript, which is being made
18 of these proceedings be read to you.

19 Number 38. Deliberation and Verdict.

20 The verdict must represent the considered judgment of
21 each juror. The verdict must be unanimous as to each question
22 on the special verdict form.

23 After your deliberations are complete and you have the
24 verdict, you will indicate your verdict on the extra copy of
25 the special verdict form that I will distribute to you. You

F2p4buc2

Charge

1 will all sign at the bottom of it and advise the marshal that a
2 verdict has been reached. It is important that you adhere
3 strictly to the instructions on the form. Please do not add
4 anything that is not called for by the special verdict form and
5 please skip any questions that the instructions require you to
6 skip based on your answers to the previous questions.

7 The purpose of the questions on the verdict form is to
8 help us -- the Court, the attorneys, the plaintiff, and the
9 defendants -- understand what your findings are. No inference
10 is to be drawn as to what the answer should be. The questions
11 are not to be taken as any indication that I have any opinion
12 as to how they should be answered. I have no such opinion.

13 Now, finally, with respect to your deliberations, your
14 first task will be to select a foreperson. The foreperson has
15 no greater voice or authority than any other juror but is the
16 person who will communicate with the Court when questions arise
17 by written note.

18 The foreperson will send out any notes, and when the
19 jury has reached a verdict, he or she will notify the marshal
20 that the jury has a verdict, and you will come into open court
21 and give your verdict.

22 Number 39. Closing Comment.

23 The most important part of this case, members of the
24 jury, is the part that you, as jurors, are now about to play as
25 you deliberate on the issues of fact. I know you will try the

F2p4buc2

Charge

1 issues that have been presented to you according to the oath
2 that you have taken as jurors. In that oath, you promised that
3 you would well and truly try the issues joined in this case and
4 a true verdict render.

5 As you deliberate, please listen to the opinions of
6 your fellow jurors, and ask for an opportunity to express your
7 own views. Every juror should be heard. No one juror should
8 hold the center stage in the jury room and no one juror should
9 control or monopolize the deliberations. If after listening to
10 your fellow jurors and if after stating your own view, you
11 become convinced that your view is wrong, do not hesitate
12 because of stubbornness or pride to change your view. On the
13 other hand, do not surrender your honest convictions and
14 beliefs solely because of the opinions of your fellow jurors or
15 because you are outnumbered.

16 Your decision must be unanimous. You are not to
17 reveal the standing of the jurors, that is, the split of the
18 vote, to anyone, including the Court, at any time during your
19 deliberations. Finally, I say this, not because I think it is
20 necessary -- indeed, I know it is not -- but because it is the
21 custom in this courthouse to say this: You should, of course
22 treat each other with courtesy and respect during your
23 deliberations, as I know you will.

24 During your deliberations, as I said, you will have
25 the exhibits with you in the jury room. You may also ask for

F2p4buc2

Charge

1 portions of the testimony. Again, please try to be as specific
2 as you can in requesting testimony. It may take time to
3 provide you the testimony once you request it.

4 If you have questions for the Court, as I said, just
5 send me a note. As I've said, each of you will have a copy of
6 this set of instructions to take with you into the jury room.

7 All litigants stand equal in this room. All litigants
8 stand equal before the bar of justice. All litigants stand
9 equal before you. Your duty is to decide between these parties
10 fairly and impartially, and to see that justice is done. You
11 should be guided solely by the evidence presented during the
12 trial and the law as I gave it to you without regard to the
13 consequences of your decision. You have been chosen to try the
14 issues of fact and reach a verdict on the basis of the evidence
15 or lack of evidence. If you let sympathy interfere with your
16 clear thinking, there is a risk that you will not arrive at a
17 just verdict. All parties to a lawsuit are entitled to a fair
18 trial. You must make a fair and impartial decision so that you
19 will arrive at the just verdict.

20 I am now just going to read the verdict form because
21 it contains some instructions, and then you will be on your
22 way, and you will also have copies of the verdict form, each a
23 copy and an extra copy for the foreperson to complete.

24 Instructions: Your answer must be unanimous as to
25 each question. The foreperson should place a mark next to your

F2p4buc2

Charge

1 unanimous answer to each question. Some questions must be
2 answered only if a certain answer was given to a previous
3 question, so please follow the directions regarding when to
4 skip questions. Unless there are specific instructions
5 regarding a question, assume you must answer it.

6 Proceed to question 1. (A) Fraudulent Transfer
7 (Claim 1).

8 1. Do you find that plaintiff has proven that
9 Magnesium Corporation (MagCorp) or Renco Metals was insolvent
10 on, or rendered insolvent because of transfers made on, any of
11 the following dates, using the definition of insolvency
12 provided in instruction number 8?

13 Check "yes" or "no" for each date.

14 Then, it lists:

15 (a) December 8, 1995. Yes or no?

16 (b) February 12, 1996. Yes or no?

17 (c) May 16, 1996. Yes or no?

18 (d) July 3, 1996. Yes or no?

19 (e) May 19, 1997. Yes or no?

20 (f) July 30, 1997. Yes or no?

21 (g) January 5, 1998. Yes or no?

22 (h) June 4, 1998. Yes or no?

23 (i) October 14, 1998. Yes or no?

24 Proceed to question 2.

25 2. Do you find that the plaintiff has proven that

F2p4buc2

Charge

1 Magnesium Corporation (MagCorp) or Renco Metals was left with
2 unreasonably small capital because of transfers made on any of
3 the following dates, using the definition of unreasonably small
4 capital provided in instruction number 10? Check "yes" or "no"
5 for each date.

6 Again, it lists the same dates that I just read with
7 the prior question.

8 Proceed to question 3.

9 3. Do you find that the plaintiff has proven that
10 Magnesium Corporation (MagCorp) or Renco Metals intended or
11 believed that it would incur debts beyond its ability to pay as
12 they became due because of fraudulent transfers made on any of
13 the following dates, as described in instruction number 7.
14 Check "yes" or "no" for each date. Again, listing the same
15 dates that I described earlier.

16 If you answered "no" to every part of question 1,
17 every part of question 2, and every part of question 3, skip to
18 question 7 below. Otherwise, proceed to answer questions 4, 5,
19 and 6.

20 Number 4. This question involves only the defendant
21 The Renco Group, Inc. If you answered "yes" to any portion of
22 question 1, question 2, and/or question 3, I instruct you that
23 defendant The Renco Group, Inc. is liable for fraudulent
24 transfers. Accordingly, if you answered "yes" to any portion
25 of question 1, question 2, and/or question 3, you are directed

F2p4buc2

Charge

1 to indicate "yes" to this question: Do you find that the
2 plaintiff has proven that The Renco Group, Inc., is liable for
3 fraudulent transfers in the 1996-1998 period, as they were
4 defined in instruction number 7?

5 If you answered question 4, proceed to question 5.

6 Question 5. This question involves the individual
7 defendants listed below. If you answered "yes" to any portion
8 of question 1, question 2, and/or question 3, you must also
9 determine if the plaintiff has proven that Magnesium
10 Corporation received less than a reasonably equivalent value in
11 exchange for the transfer. Thus, if you answered "yes" to any
12 portion of question 1, question 2, and/or question 3, you must
13 answer the following question as to each defendant: Do you
14 find that the plaintiff has proven that any of the following
15 defendants are liable for fraudulent transfers, as they were
16 defined in instruction number 7? Check "yes" or "no" for each
17 defendant.

18 Then, it lists:

- 19 (a) Ira Rennert. Yes or no?
20 (b) Michael Legge. Yes or no?
21 (c) Ron Thayer. Yes or no?
22 (d) Todd Ogaard. Yes or no?
23 (e) Lee Brown. Yes or no?
24 (f) Howard Kaplan. Yes or no?

25 If you answered question 5, proceed to question 6.

F2p4buc2

Charge

1 This is question 6: If you answered "yes" with regard
2 to a defendant in question 4 or question 5, what amount of
3 damages do you find the plaintiff has proven that defendant is
4 responsible for, using the guidance at instruction number 15?
5 Answer only with regard to defendants for whom you answered
6 "yes" in questions 4 or 5.

7 (a) The Renco Group.

8 (b) Ira Rennert.

9 (c) Michael Legge.

10 (d) Ron Thayer.

11 (e) Todd Ogaard.

12 (f) Lee Brown.

13 (g) Howard Kaplan.

14 Proceed to question 7.

15 Fraudulent conveyance (claim 2)

16 Do you find that the plaintiff has proven that any of
17 the following defendants are liable for fraudulent conveyances
18 under New York law, as they were defined in instruction numbers
19 11 through 13. Check "yes" or "no" for each defendant.

20 (a) Ira Rennert.

21 (b) Michael Legge.

22 (c) Ron Thayer.

23 (d) Todd Ogaard.

24 (e) Lee Brown.

25 (f) Howard Kaplan.

F2p4buc2

Charge

(g) The Renco Group, Inc.

(h) Trustees of the Rennert Trusts.

If you answered "no" as to all defendants in all parts of questions 1, 2, 3, and 7, skip to question 21.

If you answered "no" as to all defendants in question 7 but answered "yes" to at least one part of question 1, question 2, or question 3, skip to question 11.

If you answered at least one "yes" to question 7, proceed to question 8.

Question 8. If you answered "yes" with regard to any defendants in question 7, what measure of damages do you find that the plaintiff has proven that the defendant or defendants are responsible for, using the guidance at instruction number 15? Answer this question with respect to a particular defendant only if you found that defendant liable by answering "yes" to question 7. Leave the space next to any other defendant or defendants blank.

(a) Ira Rennert.

(b) Michael Legge.

(c) Ron Thayer.

(d) Todd Ogaard.

(e) Lee Brown.

(f) Howard Kaplan.

(g) The Renco Group, Inc.

(h) Trustees of the Rennert Trusts.

F2p4buc2

Charge

1 If you answered any portion of question 8, proceed to
2 question 9.

3 C. Aiding and abetting fraudulent conveyances
4 (claim 3)

5 Answer only if you marked at least one "yes" answer to
6 question 7 to at least one defendant other than Ira Rennert.
7 If you answered "no" to all parts of question 7 or your only
8 "yes" answer to question 7 was to Ira Rennert, you skip to
9 question 11.

10 Question 9. Do you find that the plaintiff has proven
11 that defendant Ira Rennert aided and abetted fraudulent
12 conveyances on any of the following dates under the standard
13 defined in instruction number 14? Check "yes" or "no" for each
14 date.

15 And then, once again, all of the dates I read earlier
16 are listed.

17 If you answered "no" to all parts of question 9, skip
18 to question 11. If you answered "yes" to any portion of
19 question 9, proceed to question 10.

20 10. If you answered "yes" to any part of question 9,
21 what measure of damages do you find that the plaintiff has
22 proven that defendant Ira Rennert is responsible for with
23 regard to aiding and abetting fraudulent conveyances, using the
24 guidance at instruction number 15?

25 Proceed to question 11.

F2p4buc2

Charge

1 D. Breach of fiduciary duty and aiding and abetting
2 breach of fiduciary duty (Claims 4 and 5).

3 Number 11. With respect to any transfer for which you
4 found MagCorp or Renco Metals insolvent or inadequately
5 capitalized, do you find that the plaintiff has proven that any
6 of the following defendants committed a breach of a fiduciary
7 duty as defined in instruction number 16? Check "yes" or "no"
8 for each defendant. Listing:

9 (a) Ira Rennert.

10 (b) Michael Legge.

11 (c) Ron Thayer.

12 (d) Howard Kaplan.

13 (e) Todd Ogaard.

14 (f) Lee Brown.

15 (g) Roger Fay.

16 (h) Justin D'Atri.

17 (i) Michael Ryan.

18 (j) Dennis Sadlowski.

19 If you answered "no" to all defendants in question 11,
20 skip to question 15 below. Otherwise, proceed to answer
21 questions 12, 13, and 14.

22 12. Answer only if you marked at least one "yes"
23 answer to question 11. Do you find that the plaintiff has
24 proven that any of the following defendants aided and abetted a
25 breach of fiduciary duty as defined in instruction number 17?

F2p4buc2

Charge

1 Check "yes" or "no" for each defendant, again listing:

2 (a) Ira Rennert.

3 (b) Michael Legge.

4 (c) Ron Thayer.

5 (d) Howard Kaplan.

6 (e) Todd Ogaard.

7 (f) Lee Brown.

8 (g) Roger Fay.

9 (h) Justin D'Atri.

10 (i) Michael Ryan.

11 (j) Dennis Sadlowski.

12 (k) The Renco Group.

13 If you answered question 12, proceed to question 13.

14 13. If you answered "yes" with regard to a particular
15 defendant in question 11 or question 12, what level of damages
16 do you find that the plaintiff has proven that defendant was
17 responsible for, using the guidance in instruction number 18.

18 Answer only with regard to those defendants for which you found
19 liability by answering "yes" to question 11 and/or question 12.

20 Do not include any amount for punitive damages in your answer
21 to this question. And then listing:

22 (a) Ira Rennert.

23 (b) Michael Legge.

24 (c) Ron Thayer.

25 (d) Howard Kaplan.

F2p4buc2

Charge

(e) Todd Ogaard.

(f) Lee Brown.

(g) Roger Fay.

(h) Justin D'Atri.

(i) Michael Ryan.

(j) Dennis Sadlowski.

(k) The Renco Group.

If you answered any part of question 13, proceed to question 14.

Punitive damages. If you answered "yes" with regard to a particular defendant in question 11 or question 12, you must determine whether the plaintiff has proven that punitive damages should be imposed upon that defendant. Accordingly, you should answer this question only with regard to those defendants you found liable in question 11 or question 12 by answering "yes" as to that defendant. For all defendants to whom you gave a "yes" answer in question 11 or question 12, you must first indicate whether you find that punitive damages should be imposed against that defendant, using the guidance in instruction number 19. To do this, check "yes" or "no" next to the defendant's name. Second, if you answered "yes" to any particular defendant, you must indicate the amount of punitive damages that the defendant should be responsible for on the line below. Again, listing all of the defendants that I just read.

F2p4buc2

Charge

1 Proceed to question 15.

2 E. Unlawful dividends and unlawful stock redemptions
3 (Claims 6A, 6B, and 6C)

4 15. Do you find that the plaintiff has proven that
5 defendant Ira Rennert made unlawful dividend payments as
6 defined in instruction number 12. Yes or no?

7 Proceed to question 16.

8 16. Do you find that the plaintiff has proven that
9 defendant Ira Rennert made unlawful stock redemptions as
10 defined in instruction number 21? Yes or no?

11 If you answered "no" to both question 15 and question
12 16, skip to question 21. If you answered "yes" to question 15,
13 question 16, or both, answer question 17.

14 17. Do you find that defendant Rennert has met his
15 burden of establishing a good faith defense, as defined in
16 instruction number 22? Yes or no?

17 If you answered "yes" to question 17, skip to question
18 21. If you answered "no," proceed to questions 18 and 19.

19 18. If you answered "yes" to question 15 and/or
20 question 16 and "no" to question 17, what measure of damages do
21 you find the plaintiff has proven that defendant Ira Rennert is
22 responsible for, using the guidance at instruction number 24?

23 If you answered question 18, proceed to question 19.

24 19. Do you find that the plaintiff has proven that
25 defendant The Renco Group, Inc. is liable for unlawful

F2p4buc2

Charge

1 dividends under the standard as I have defined it for you in
2 instruction number 23? Yes or no?

3 If you answered "no" to question 19, skip to question
4 21. If you answered "yes" to question 19, answer question 20.

5 Number 20. If you answered "yes" to question 19, what
6 measure of damages to you find that the plaintiff has proven
7 that defendant The Renco Group, Inc. is responsible for, using
8 the guidance at instruction number 24.

9 Proceed to question 21.

10 F. Unjust enrichment (Claim 7).

11 21. Do you find that the plaintiff has proven that
12 defendants Ira Rennert or the Trustees of the Rennert Trusts
13 received a direct benefit from Magnesium Corporation and/or
14 Renco Metals that defendants Ira Rennert or the Trustees of the
15 Rennert Trusts were not entitled to receive? Yes or no?

16 If you answered "no" to question 21, do not answer
17 questions 22 and 23. If you answered "yes" to question 21,
18 proceed to question 22.

19 22. If you answered "yes" to question 21, do you find
20 that Magnesium Corporation and/or Renco Metals was harmed by
21 conveying the direct benefit you identified in response to
22 question 21? Yes or no?

23 If you answered "no" to question 22, do not answer
24 question 23. If you answered "yes" to question 22, proceed to
25 question 23.

F2p4buc2

Charge

1 23. If you answered "yes" to question 22, what do you
2 find was the value of the benefit conferred by MagCorp and/or
3 Renco Metals on defendants Ira Rennert and Trustees of the
4 Renco trusts?

5 The last page says, after completing the form, each
6 juror who agrees with the verdict must sign below.

7 Members of the jury, I'm going to ask for a few more
8 moments of patience, sit quietly there or you may stand or
9 stretch, but please remain silently for a few moments as I
10 speak with the lawyers at the side bar.

11 (Continued on next page)

12
13
14
15
16
17
18
19
20
21
22
23
24
25

F2p4buc2

Charge

1 (At the sidebar)

2 THE COURT: Anything that I read wrong, counsel?

3 MR. HAVELES: Yes, your Honor. Page 7, your Honor,
4 line 6.

5 THE COURT: Page 7, line 6.

6 MR. HAVELES: You said, should not show any prejudice
7 against any party or his client, instead of any attorney or his
8 client.

9 I'm not sure that is material enough to justify.

10 THE COURT: Are you asking me to --

11 MR. HAVELES: No, it is not necessary.

12 THE COURT: Anything else I read wrong?

13 Do you have anything --

14 MR. STIRLING: We have no material.

15 MR. HAVELES: I note a typo on page 20. The word "if"
16 is spelled as "ig."

17 MR. BEUS: We will waive that complaint.

18 THE COURT: No one cares about that typo. Okay.

19 MR. HAVELES: Page 27. I'm just doing what you asked,
20 your Honor.

21 THE COURT: Fair enough.

22 Anything that I read wrong that you care about is what
23 I'm looking for here.

24 MR. BEUS: We have nothing.

25 MR. HAVELES: Page 27, your Honor. Line 9, instead of

F2p4buc2

Charge

1 net worth appreciation payments, you said net worth
2 appreciation agreements. That should be corrected.

3 THE COURT: I will correct that. I said agreements.

4 MR. HAVELES: Your Honor, for the purposes of the
5 record, I note my continuing objection, notwithstanding your
6 reservation with respect to the New York law, as to the
7 individual Utah defendants.

8 The punitive damages charge and the unjust enrichment
9 charge without the proviso that it should be considered only if
10 there is a fraudulent transfer or conveyance. I note those
11 continuing objections for the purpose of just preserving my
12 record for appeal.

13 THE COURT: Okay.

14 MR. STIRLING: Just so it's clear, I don't think it is
15 necessary to do that to preserve the record. We will stand on
16 the record we made earlier.

17 THE COURT: It is not, and you do.

18 (Continued on next page)
19
20
21
22
23
24
25

F2p4buc2

Charge

1 (In open court; jury present)

2 THE COURT: Members of the jury, I had to make sure
3 that I didn't make any mistakes in my reading of the
4 instruction.

5 Just one I want to note. When you get the written
6 one, it will be corrected. On page 7, instruction number 18,
7 in the last sentence, I said net worth appreciation agreements,
8 but it is actually net worth appreciation payments. The
9 written instruction is correct. I wanted to make sure that I
10 had read the instructions correctly.

11 With that, as you go into the jury room, we're going
12 to give you each a copy of the instructions that I read, each a
13 copy of the verdict form, and an extra verdict form, which is
14 what will be filled out by the foreperson and signed by all of
15 you when you have completed your deliberations.

16 There are envelopes and paper and writing implements
17 for any notes that come out that should be written by the
18 foreperson, any notes or questions, and lunch will be brought
19 in to you at 12:30. You are to continue a working lunch for
20 your deliberations.

21 Other than that, we will wait to hear from you.

22 So I'm directing my staff, as they go in, to hand out
23 the copies of the instructions and the verdict forms. With
24 that, I thank you very much, members of the jury.

25 One more thing. We have a marshal to secure the

F2p4buc2

Charge

1 jury's deliberations.

2 Sir, would you come forward.

3 (Marshal sworn)

4 THE COURT: All right. With that, you may head into
5 the jury room.

6 Thank you very much.

7 (At 10:30 a.m., the jury retired to deliberate)

8 (Continued on next page)

F2p4buc2

Charge

1 (In open court; jury not present)

2 THE COURT: Anything to take up?

3 MR. HAVELES: Your Honor, I believe the exhibits need
4 to be transported into the jury room.

5 THE COURT: They do.

6 MR. HAVELES: Several boxes.

7 THE COURT: They will go from you to my deputy clerk
8 to the marshal, who will bring them in the room.

9 MR. HAVELES: Yes, your Honor.

10 THE COURT: I meant to say this and forgot: You
11 should be here or very close to here.

12 I meant to tell the jurors that I give you a lunch
13 break. So you can take a lunch break at 12:30, when they get
14 their lunch, on the assumption we won't get a note for about
15 45 minutes.

16 Otherwise, you should be about or letting Ms. Nunez
17 know how to get you back here within a minute or two, so that
18 if any notes come out we can address them promptly.

19 MR. HAVELES: Your Honor, Mr. Park, Mr. Fuisz, and I
20 will be here at all times.

21 One quick question, though: What time do you intend
22 to send the jury home today if no verdict is reached?

23 THE COURT: I let them decide. If I get a question
24 from them as to when it will be, I will tell them, by all
25 means, they can stop at 5:00 and resume in the morning; that if

F2p4buc2

Charge

1 they want to, they all want to continue, they may continue. No
2 one has ever taken me up on that. But sometimes they're close,
3 and that could happen. But presumably, if they're not done
4 today, they will finish at 5:00. I will bring them out,
5 instruct them, and remind them of the continuing instructions
6 that pertain, and then I will tell them to resume deliberations
7 at 9:30 tomorrow morning, when they are all present.

8 Anything else?

9 MR. HAVELES: Nothing from this side, your Honor.

10 MR. STIRLING: Nothing, your Honor.

11 THE COURT: My deputy just reminded me, Court Exhibit
12 8, which everybody has agreed is the list of admitted exhibits,
13 is going to go back as a cover to the exhibits.

14 MR. HAVELES: Yes, your Honor.

15 MR. STIRLING: Is that Court Exhibit 8? I had it as
16 9; 8, I think was the list that was marked pages 458, 459 of
17 the transcript, what was originally going to be Court
18 Exhibit 1.

19 THE COURT: You're correct. Court Exhibit 9.

20 MR. STIRLING: Very well.

21 THE COURT: Thank you.

22 We will wait until we hear from the jury. As I said,
23 you can take about a 45-minute lunch break at 12:30.

24 (Recess pending verdict)

25 (Continued on next page)

F2PMBUC3

1 THE COURT: I received a note which says at the top:
2 Request. Then it lists a bunch of things. I will just read
3 what it says. Notice of violation-EPA; settlement
4 agreement-EPA; MagCorp balance sheets, '93 to '98; AMAX note,
5 Exhibit No. 2092. Then under that, amount of dividends for
6 each defendant and dates.

7 They have the exhibits. I don't understand the
8 request for Exhibit 2092. To the extent some of the things
9 that they are seeking are exhibits, we can certainly point them
10 to the exhibit number.

11 Taking these one at a time, notice of violation-EPA.

12 MR. HAVELES: It must be referring to the 1992 Utah
13 one because the EPA in 2001 complaint is not in evidence, your
14 Honor. Likewise, the settlement agreement refers to the '97
15 settlement agreement.

16 THE COURT: I assume so, too. Are they in evidence?

17 MR. HAVELES: They are both in evidence, your Honor.

18 THE COURT: The first one, notice of violation.

19 MR. HAVELES: I need to look up the exhibit numbers
20 for each of them, your Honor.

21 The balance sheets for '93 through '98 are scattered
22 through a variety of different documents, and I would need to
23 go through them to -- and they are not uniformly in the same
24 documents. So we would need to go through the documents to
25 pick out which ones they are.

F2PMBUC3

1 The AMAX note is a page in a compilation of documents.

2 THE COURT: Go ahead.

3 MR. HAVELES: As to 2902, I don't know --

4 THE COURT: 2092.

5 MR. HAVELES: 2092, I don't know.

6 THE COURT: My deputy says it's not in evidence.

7 MR. HAVELES: I don't know what that exhibit is, off
8 the top of my head.

9 MR. S. STIRLING: Your Honor, I think 2092 is related
10 to the following request: The amount of dividend for each
11 date, because that document is 2090.

12 THE COURT: Somebody thought it was 2092.

13 MR. S. STIRLING: I think that maybe is what happened.

14 THE COURT: 2090 is in evidence?

15 MR. S. STIRLING: Yes. Let me just confirm --

16 MR. HAVELES: I need to look at that just to be sure
17 as well.

18 THE COURT: I'll step down. Take a few moments to
19 come up with and confer as to what you think is the appropriate
20 document to point them to is, if there is such a document and,
21 in the absence of that, what you propose to be sent to them.

22 MR. HAVELES: Yes, your Honor.

23 THE COURT: I think I've told you this. But if I have
24 not, my procedure is, I bring them all in, I read the note out
25 loud verbatim, just to make sure that everybody has heard it,

F2PMBUC3

1 and then provide what I've come to conclude based on your input
2 is the correct answer.

3 They didn't use an envelope for this note. Assuming
4 they have envelopes, I will tell them to stick it in an
5 envelope.

6 I'll come back in a few moments.

7 (Recess pending verdict)

8 THE COURT: Do you have a proposal?

9 MR. HAVELES: Your Honor, the NOV is Exhibit 8051, the
10 settlement agreement is 8825. The AMAX note is Exhibit 2172,
11 starting at page 0127.

12 THE COURT: Skipping for the moment the balance
13 sheets?

14 MR. HAVELES: Yes. It's a little more complicated,
15 your Honor.

16 THE COURT: I'm sorry. Give me the note again.

17 MR. HAVELES: 2172, starting at page 0127.

18 THE COURT: And then we believe they are asking for
19 2090.

20 MR. HAVELES: I concur with that, your Honor.

21 There is also information.

22 THE COURT: I'm sorry. Pardon me. On that one what
23 I'll say is, I'll read what they said and say there is not in
24 fact a 2092 in evidence. We believe that what they are
25 referring to by asking for amount of dividends for each

F2PMBUC3

1 defendant and dates, that they are looking for Exhibit 2090.

2 MR. S. STIRLING: Your Honor, because that information
3 is also in the agreed facts that we marked yesterday as Exhibit
4 2792, beginning on page 19, all of the payments are listed
5 there.

6 MR. HAVELES: Except, however, starting on page 19,
7 and this is where it gets -- I don't think there is any
8 evidence that was put in the evidence. The stipulated facts
9 aggregate says what the total number of NWAPA payments to the
10 totality of the individuals were during a calendar year, but
11 there is no itemization of the net worth appreciation payments
12 by individual in the stipulated facts, nor did plaintiff
13 introduce any documents showing the amounts of the specific
14 payments to individuals of the net worth appreciation payments.

15 MR. S. STIRLING: Your Honor, I believe those are
16 listed in the 10-Ks for 1998 or 1999. We can find those
17 exhibit numbers for it as well.

18 MR. HAVELES: Do they go back to the '95 payments,
19 though?

20 MR. R. STIRLING: It's fiscal '96, which would cover
21 December '95. I believe it is broken out for at least three of
22 the individuals, and I believe in a footnote it refers to Brown
23 and one of the other -- Ogaard might be referenced in a
24 footnote.

25 THE COURT: Here is my view. Someone obviously had in

F2PMBUC3

1 their head 2090 because they asked for 2092. And what they
2 wrote is the amount of dividends for each defendant and dates.
3 So my inclination is simply to point them to 2090.

4 MR. HAVELES: That's fine, your Honor.

5 As to the balance sheets, your Honor, there are
6 balance sheets for MagCorp for '95 through '98. The balance
7 sheets that are in the record for '93 and '94 are for Renco
8 Metals, which includes both Renco and Sabel. There is no
9 separate balance sheet, even in the segment accounting in the
10 10-K, for MagCorp alone.

11 I can give you the exhibit numbers for fiscal year
12 ending October 31 of each of the years. Fiscal year '95 is
13 8139; fiscal year '96 is 8428; fiscal year '97 is 8308; and
14 fiscal year '98 is 8369. Let me just check the '96 one, your
15 Honor. I think I miswrote the number. I did miswrite the
16 number for '96. The correct number is 8248.

17 THE COURT: What year is that?

18 MR. HAVELES: This is for '96. It's 8248. As I said,
19 there are no standalone balance sheets for MagCorp in the
20 record for '93 and '94.

21 THE COURT: What's the proposal on that?

22 MR. S. STIRLING: The question exactly that they
23 asked.

24 THE COURT: It says: MagCorp -- little hard to read.
25 It says M-a-g-c-o -- looks to me like c-o-o-r.

F2PMBUC3

1 MR. S. STIRLING: In any case --

2 THE COURT: In any case, it means MagCorp. It says
3 MagCorp balance sheets, '93 to '98.

4 One possibility is to respond by saying that the
5 MagCorp balance sheets in the record can be found at, and then
6 listing each fiscal year with the exhibit number.

7 Mr. Stirling.

8 MR. S. STIRLING: I have not another proposal to make,
9 your Honor.

10 THE COURT: Mr. Haveles.

11 MR. HAVELES: I am looking at the footnotes that
12 Mr. Stirling referred me to about the net worth appreciation
13 payments to see what they say about payments.

14 Your Honor, with respect to the net worth appreciation
15 payments, the 10-Ks to which Mr. Stirling alluded, show the
16 specific payments for Legge, Kaplan, and Thayer. They do not
17 show the amount of the payments for Brown and Ogaard. Those
18 are Exhibit 8330 at page 0039 and 8382 at page 0043 for Legge,
19 Kaplan, and Thayer. I don't believe there are any documents
20 that shows the specific amounts paid to Brown and Ogaard in any
21 other document.

22 THE COURT: I got 8330 at page 0039.

23 MR. HAVELES: And 8382, your Honor, for page 0043.

24 THE COURT: 8382 at 0043.

25 MR. HAVELES: Yes, your Honor.

F2PMBUC3

1 THE COURT: And those are, again, for --

2 MR. HAVELES: For Legge, Kaplan, and Thayer.

3 THE COURT: So the proposal would be to say: They
4 have indicated 2092. That's not in evidence. It seems as
5 though they are referring to 2090, listing the dividend amounts
6 for who?

7 MR. HAVELES: That one shows the dividend payments
8 paid to the Renco Group.

9 THE COURT: And then we can point them to 8330 at page
10 on 0039 and 8382 at page 0043 to find the net worth
11 appreciation payments to Mr. Legge, Mr. Kaplan, and Mr. Thayer.

12 MR. HAVELES: I will note, your Honor, in that regard,
13 for clarity purposes they show the total dollar amount paid
14 during a fiscal year. They don't break it down by transfer
15 dates. So there is no allocation of the payments made to those
16 three individuals by transfer date. It just shows the total
17 amount in a particular fiscal year paid to an individual. And
18 as the jury verdict form that your Honor read indicates, there
19 are numerous dates within each fiscal year. There are several
20 in fiscal '96, several in fiscal '97, and '98.

21 THE COURT: Again, what's your proposal?

22 MR. HAVELES: My proposal is they can look for the
23 total dollar amount paid in a fiscal year as to those three
24 individuals on the pages that we have identified, your Honor.

25 THE COURT: Let me get it down. And I'll ask you,

F2PMBUC3

1 Mr. Stirling, anything else?

2 MR. S. STIRLING: Yes, your Honor. I think if we are
3 going to refer them to information about net worth appreciation
4 payments, anything other than strictly dividends, that we
5 should refer them to Exhibit 2792 and the agreed facts. I
6 think that information will be helpful to them. It may help
7 them frame additional questions. But we think they can
8 determine the answers to their questions from the agreed facts.

9 MR. HAVELES: I have problems with the agreed facts.
10 But it just tells them the totality of dollars paid to the
11 group in a calendar year without breaking it down by individual
12 on the net worth appreciation payments. I have no problem with
13 the reference to that. I think they are going to find it
14 somewhat opaque when they read the paragraphs.

15 THE COURT: I do the 2090, I do the 8330, 8392, as we
16 have discussed, including saying that those are for total
17 dollar amounts paid in the fiscal year as to Legge, Kaplan and
18 Thayer. Given what they are asking here, they may also want to
19 look at stipulated facts at 2792.

20 MR. HAVELES: To be precise, your Honor, it is pages
21 19 through 22 for everything, both dividends and net worth
22 appreciation.

23 THE COURT: The suggestion would be to just point them
24 to that. In light of what they are asking for, they may also
25 want to look at 2792, pages 19 to 22. That seems quite

F2PMBUC3

1 reasonable.

2 MR. S. STIRLING: We are fine with that, your Honor.

3 THE COURT: Anything else, Mr. Stirling? On the
4 MagCorp balance sheets, the proposition is to say, they have
5 asked for '93 to '98. I can point them to the balance sheets
6 for MagCorp for fiscal year '95, '96, '97, '98 period.

7 MR. HAVELES: With those exhibit numbers, yes, your
8 Honor.

9 THE COURT: Yes.

10 MR. HAVELES: Thank you.

11 THE COURT: Okay, Mr. Stirling?

12 MR. S. STIRLING: Yes, your Honor. We don't have all
13 of these numbers in front of us right at moment, your Honor.

14 MR. HAVELES: I will repeat them again.

15 MR. S. STIRLING: I was referring to something else.
16 The net worth appreciation agreements themselves are in
17 evidence.

18 MR. HAVELES: I don't think what's what they asked
19 for. They are looking for numbers, not the underlying
20 agreements.

21 THE COURT: For my mind, I think the farther we go
22 down this road the more likely I am just going to say 2090,
23 since that's what they asked for.

24 MR. S. STIRLING: I think, your Honor, with what we
25 have identified, I think they can figure it out, the answers to

F2PMBUC3

1 their questions, or they can let us know if need further
2 direction.

3 THE COURT: We don't know what they are looking for
4 exactly. I think it's likely, answer what's asked and then if
5 there are more, answer them.

6 MR. S. STIRLING: Very well.

7 THE COURT: We will bring them out. I will read the
8 note. I will give the answers we have discussed. And then
9 I'll send them back. I will ask them to put future notes in an
10 envelope.

11 I am going to shorten your break now, because of a
12 note that fast, to 30 minutes. I will just tell them in the
13 next 30 minutes we will be a little slow to respond.

14 MR. HAVELES: That's fine, your Honor.

15 (Jury present)

16 THE COURT: I received a note and I want to read the
17 note and give you the responses. The note says at the top:
18 Request and then first lists, notice of violation-EPA. The
19 response to that is it can be found in Exhibit 8051.

20 Settlement agreement-EPA, Exhibit 8825.

21 Next, MagCorp balance sheets, year '93 to '98. I can
22 point you to MagCorp balance sheets for the following fiscal
23 years: Fiscal year '95 is at Exhibit 8139; fiscal year '96 is
24 at 8248; fiscal year '97 is at 8308; and fiscal year '98 is at
25 8369.

F2PMBUC3

1 Next, the request asks for the AMAX note which can be
2 found at Exhibit 2172, starting at page 0127.

3 The next request is Exhibit No. 2092 and then under
4 that is written, amount of dividends for each defendant and
5 dates. We believe that you may be asking for 2090. 2092 is
6 not a document in evidence, but 2092 we think may be what you
7 are looking for. I can also point you to the following
8 documents: Exhibit 8330 at page 0039, and 8382 at page 0043.
9 You can look here for the total dollar amount paid in a fiscal
10 year with respect to the following three individuals: Legge,
11 Kaplan, and Thayer. You may also give them what you have asked
12 for, what to look to, Exhibit 2792, which is the stipulated
13 facts, agreed facts and, in particular, at pages 19 to 22.

14 MR. S. STIRLING: Agreed.

15 MR. HAVELES: Agreed, your Honor.

16 THE COURT: Thank you.

17 That's the responses to the questions.

18 Just a few additional directions. I will ask if other
19 notes come out if you could put them in the envelope. There is
20 some envelopes in there, seal it, pass it to the marshal. I
21 would appreciate it.

22 I also want you to know, I am going to give the
23 attorneys just a 30-minute break now for lunch. Otherwise,
24 they are here and I'm here. If you have a note in the next 30
25 minutes, we will be a little bit slow to respond. Otherwise,

F2PMBUC3

1 we will get to anything you ask as fast as we can.

2 Thanks so much. You can return to the jury room.

3 (Jury deliberations resumed, time noted: 1238 p.m.)

4 THE COURT: I will mark the first note that has come
5 out that I just read from as Court Exhibit 10.

6 I also want to indicate, I received a press request
7 for the verdict form. I think what I am going to do, I meant
8 to do this anyway, I always mark the final instructions and the
9 blank verdict form as court exhibits. I will now mark the jury
10 charge as Court Exhibit 11 and the blank verdict form as Court
11 Exhibit 12. All the court exhibits usually go up on the docket
12 at the end. But since I have a request, I will just docket
13 separately now Court Exhibits 11 and 12.

14 Anything else?

15 MR. HAVELES: No, your Honor.

16 THE COURT: We will wait to hear from the jury. Thank
17 you.

18 (Recess pending verdict)

19 THE COURT: I did receive another note requesting
20 items from the jury which I'll mark as Court Exhibit 13. The
21 first is exhibits not found, No. 8139 and 8248. 8139 is not on
22 my list and 8248 is not on my list.

23 MR. HAVELES: I apologize, your Honor, because I was
24 working from an unannotated list. Let me see if there is a
25 defendants' version of those particular documents for those

F2PMBUC3

1 particular years.

2 THE COURT: Thank you.

3 I suppose we should have checked what we were pointing
4 them to was actually an exhibit in evidence.

5 MR. HAVELES: I thought they had been offered as part
6 of the financial exhibits, your Honor, and that's my mistake.

7 THE COURT: I understand.

8 MR. HAVELES: Your Honor, I want to check. I think
9 they were marked twice.

10 THE COURT: I was going to ask Mr. Stirling if he had
11 any.

12 MR. HAVELES: I think I have it.

13 THE COURT: If I may, while you are doing that --

14 MR. HAVELES: I just want to look at it.

15 I do have them, your Honor. 8846 at page 3 --

16 THE COURT: Sorry. This is to replace 8139?

17 MR. HAVELES: Yes.

18 THE COURT: 8139 is, in fact --

19 MR. HAVELES: 8846 at page 3, 0344. I will also note
20 that this document shows for the jury's reference, this is for
21 the -- I'm sorry. Wrong page, your Honor. I gave you a
22 calendar one.

23 Your Honor, the correct page is 0248 and that shows
24 the balance sheet for fiscal year ending October 31, 1995.
25 Consistent with accounting convention, it also shows the

F2PMBUC3

1 balance sheet for the year preceding seeding October 31, 1994.
2 That partially answers the jury's question looking for the '94
3 balance sheet for MagCorp. That's page 248 of Exhibit 8846.

4 THE COURT: I'll tell them that that 8139 is, in fact,
5 8846 at page 0248. And 8248 is --

6 MR. HAVELES: 8847. I just have to get you the page
7 number, your Honor. The page number is 0265 on Exhibit 8847
8 and that is the balance sheet for the fiscal year ending
9 October 31, 1996.

10 THE COURT: Mr. Stirling.

11 MR. S. STIRLING: Your Honor, I'm sorry we didn't get
12 this information sooner, but on the defendants' list, as well,
13 8844 is the MagCorp financial statements for 1993 and 8845
14 include the financial statements for 1994. So the two earlier
15 years that the jury had requested are, I believe, both in
16 evidence as well.

17 MR. HAVELES: Mr. Stirling is right about 8845 and
18 I'll get the page number for you in a moment, your Honor. I
19 apologize for not having seen that earlier. The page number on
20 8845, your Honor, is page 0261, and that is the balance sheet
21 for the fiscal year ending October 31, 1994 and showing the
22 prior year balance sheet, October 31, 1993.

23 THE COURT: So do we need 8844 as well?

24 MR. HAVELES: Yes.

25 THE COURT: You want to give me the page number for

F2PMBUC3

1 8844.

2 MR. HAVELES: Sure, your Honor, I can do that. On
3 8844 the page is 0231. Shows the balance sheet as of the end
4 of the fiscal year October 31, 1993 and it shows the prior
5 year, balance sheet for October 31, 1992.

6 THE COURT: I'll tell them for 8139, in fact, they
7 should look to 8846 at page 0248 for the fiscal year ending
8 October 31, 1995, and instead of 8248 they should look at 8847
9 at 265. What year is that for?

10 MR. HAVELES: It shows the fiscal year '96. Looking
11 backwards, the fiscal year '95 as well.

12 THE COURT: Ending fiscal year 1996 and also,
13 consistent with their earlier request, I can also point them to
14 8844 at 0231 for the fiscal year ending October 1993, and 8845
15 at 261 for the fiscal year ending in October of 1994.

16 The next thing they say, it says: Needed.
17 Document-testimony regarding -- I believe it says "lacking of
18 permit."

19 MR. HAVELES: I think that may take some time, your
20 Honor, because there was one snippet of testimony shown in Mr.
21 Beus' closing, but it was a snippet of longer testimony by Mr.
22 Tripp, so we are going to have to look through Mr. Tripp's
23 testimony. I don't have an immediate answer on that.

24 THE COURT: And then the last under the needed is,
25 dash, testimony from yesterday, of which there was none.

F2PMBUC3

1 MR. HAVELES: That was all closing argument.

2 THE COURT: I would propose telling them that they
3 have asked for testimony from yesterday. Of course, there was
4 just closings yesterday and, as I've instructed them,
5 statements of counsel, including closings, are not evidence and
6 that I can only send back to the jury room admitted evidence.

7 MR. HAVELES: That sounds good. Can we have about
8 five minutes to look for that testimony, your Honor?

9 THE COURT: You can. I just want to get agreement on
10 what I just said.

11 Mr. Stirling.

12 MR. S. STIRLING: Yes, your Honor.

13 MR. HAVELES: Makes sense to me.

14 THE COURT: So the open issue that you are looking for
15 is what they have indicated as document/testing-testing
16 regarding "lacking of permit."

17 MR. S. STIRLING: Your Honor, I think, pages 1334 and
18 1335 of the transcript, where I asked Mr. Tripp whether they
19 had a permit to treat, store, dispose of hazardous waste.

20 THE COURT: Thank you. I am going to step down, see
21 if you can find what you need, see if you can come to
22 agreement. I'll come back in a few minutes. If you are ready,
23 let Ms. Nunez know and she will come get me.

24 (Recess pending verdict)

25 MR. HAVELES: Do you want to deal with the pending

F2PMBUC3

1 note first?

2 THE COURT: Sure.

3 MR. HAVELES: We have looked at the testimony --

4 THE COURT: No. Just because this is just a print
5 job, maybe somebody can do it. They are asking for nine copies
6 of Exhibit 2792. It says please and thank you, which is nice.
7 I assume nine copies because they have one. If somebody could
8 print -- Mr. Stirling, it's your exhibit. That was the next
9 note which I will mark as Court Exhibit 14.

10 Returning to the earlier note, go ahead, Mr. Haveles.

11 MR. HAVELES: Mr. Stirling had identified some
12 testimony for us to look at, your Honor. And we concur that
13 starting at page 1334, line 21 through page 1335, line 11. We
14 have looked to see if there is any corresponding testimony
15 during my examination on this subject, and not any that is a
16 clear correspondence, so that would be the only testimony.

17 THE COURT: While you are looking at that, could
18 somebody print those page and line numbers, and then we will
19 get you a marker to redact anything on the page that's not
20 responsive so that we can just hand them the testimony to take
21 back.

22 MR. S. STIRLING: Your Honor, if I may, could I cut
23 and paste that on to a Word, just those lines onto a Word --

24 MR. HAVELES: Your Honor, we have some additional
25 testimony. Page 1380, line 12 through 1381, line 5. That also

F2PMBUC3

1 deals with the issue of permit.

2 THE COURT: Can someone, while Mr. Stirling is looking
3 at that, just remind me what 2792 is --

4 MR. HAVELES: Stipulated facts.

5 THE COURT: Thank you.

6 MR. R. STIRLING: Your Honor, if I may, I'm printing
7 2792. I don't know if we will have enough paper for nine
8 copies of it, though.

9 MR. HAVELES: We might have some additional paper.

10 THE COURT: We can lend a hand here.

11 Mr. Stirling, I will certainly give you time to
12 continue looking at what Mr. Haveles proposes, but I think the
13 best way to do this is just to actually, if you can -- if not,
14 we will help -- but print the pages from the transcript with
15 redaction of anything that's not responsive and that way we are
16 not cutting and pasting. It's clear if there are two sets that
17 they are from different times and the like.

18 Mr. Haveles, are you able to print yours?

19 MR. HAVELES: Sure.

20 THE COURT: Okay, Mr. Stirling.

21 MR. S. STIRLING: Yes, your Honor.

22 MR. HAVELES: Your Honor, we also ask that the jury
23 look at page 2116, starting at line 25 through 2117 at line 11.

24 THE COURT: You had proposed, Mr. Stirling, 1334, line
25 21 through 1335, line 11.

F2PMBUC3

1 MR. S. STIRLING: Yes, your Honor.

2 THE COURT: And then defendants' additional requests
3 are 1380, line 12 through 1381, line 8 and 2116, line 25
4 through 2117, line 11.

5 MR. S. STIRLING: Yes. I'm just looking at the
6 second.

7 THE COURT: I'm hoping somebody is printing these.

8 MR. HAVELES: We are attempting to, your Honor. Just
9 some technical logistics of hooking up the hard drive to the
10 machine that's connected to the printer.

11 THE COURT: Presumably, there might be other testimony
12 requests. Whatever you can do.

13 MR. HAVELES: To expedite it. I understand. This is
14 our first dry run. We will get it down for the next time more
15 quickly.

16 While we are waiting, your Honor, once we get these
17 excerpted, how would they be presented, read by your Honor?

18 THE COURT: I will send it back. But just with
19 blacked out anything that we have not agreed to.

20 MR. HAVELES: Got you. Thank you.

21 THE COURT: In fact, what we could do is bring them
22 in, I can tell them what we have discussed regarding the
23 exhibits, tell them that we are pulling together the testimony
24 that they have asked for, we will send that back shortly, give
25 my answer about their request for the testimony from yesterday,

F2PMBUC3

1 and then tell them that we are making copies of 2792 that we
2 will send back with the testimony transcripts.

3 MR. HAVELES: Very well, your Honor.

4 THE COURT: Is that okay, Mr. Stirling?

5 MR. S. STIRLING: Yes, your Honor.

6 (Jury present)

7 THE COURT: Thank you for your patience. There is a
8 slight delay responding to your notes because of that short
9 lunch break.

10 The first note I got said: Exhibits not found, 8139,
11 8248. You are right. That was a mistake. Let me give you the
12 cross reference of those exhibits. 8139 is, in fact, 8846 at
13 page 0248. That's for the fiscal year ending October 31, 1995.
14 And 8248 is, in fact, 8847 at page 265 and that's at page 0265
15 and that's for the fiscal year ending October 31, 1996. I can
16 also point you to two additional ones that are responsive to
17 your earlier request: 8844 at 0231 is for the fiscal year
18 ending October 31, 1993, and 8845 at 0261 is for the fiscal
19 year ending October 31, 1994. Again, I'm pointing you to 8846,
20 8847, 8844, and 8845.

21 On this same note you said: Needed
22 documents/testimony regarding "lacking of permit." We are
23 pulling that together and as soon as we get it printed, I will
24 send back to you the transcript of that testimony.

25 You also asked for testimony from yesterday. And here

F2PMBUC3

1 what I can say is, as you recall, there was not testimony
2 yesterday. There was just closing arguments of counsel. And
3 as I've instructed, arguments of counsel, statements of
4 counsel, including closing arguments, are not testimony and not
5 evidence. And so all I can send back to you at this point for
6 your deliberations is evidence. And so I can't send you
7 anything from yesterday because there was no evidence
8 yesterday.

9 The next note that came out asked for nine copies of
10 2792, please and thank you, and we are printing copies of that
11 and very shortly it will be handed back to you along with the
12 excerpts of the trial transcript that you asked for.

13 Thank you very much. You may return to the jury room.

14 (Jury deliberations resumed; time noted: 1:55 p.m.)

15 THE COURT: I've been handed nine copies of 2792.
16 They don't have the exhibit numbers. Everyone comfortable that
17 they are what they are?

18 MR. HAVELES: Mr. Stirling showed them to me and I had
19 an opportunity to examine them. They are what they are, your
20 Honor.

21 THE COURT: Thank you.

22 Do you have the testimony?

23 MR. HAVELES: We are printing it so we don't have to
24 put black lines in it so it's just the page and line. We
25 should have it in like another minute or so, just because we

F2PMBUC3

1 have to print one at a time because of the logistics of going
2 back and forth between the computers since it's on a wireless
3 printer.

4 THE COURT: You mean you cut and paste from it.

5 MR. HAVELES: We can go into the transcript and just
6 block out so it's the page and line without the above and below
7 so we don't have to black out anything.

8 THE COURT: We may need you to do that for Mr.
9 Stirling's as well.

10 MR. S. STIRLING: I don't have the ability to do that
11 myself here.

12 MR. HAVELES: I'm now being advised that we can't do
13 that. We are printing the pages and we will have to black out.
14 I thought we could, but apparently not.

15 THE COURT: Mr. Stirling.

16 MR. S. STIRLING: I have pages 1334 and 1335. They
17 have not been redacted or blacked out, just those two pages.

18 MR. HAVELES: We have the first one. As soon as
19 Mr. Stirling is done with the Sharpie, we will start with the
20 other one as well.

21 THE COURT: Unless there are sustained objections,
22 it's not a concern about the jury seeing it. It's just a
23 concern making sure that they know what we are indicating is
24 responsive.

25 MR. S. STIRLING: Correct.

F2PMBUC3

1 THE COURT: Could you show it to them, Mr. Stirling.

2 The marshal has come forward. He received an oral
3 request from the jury for a calculator.

4 How would you like me to respond?

5 MR. HAVELES: Maybe the first thing is to tell them
6 they should do their requests in writing.

7 THE COURT: I will do that.

8 MR. HAVELES: If we don't give them a calculator, they
9 are going to use pen and paper and their fingers. I am not
10 sure it's a request we can deny. We just see if we can find
11 one for them.

12 THE COURT: Anyone object to me instructing the
13 marshal here to ask them here to put any communications,
14 including requests on paper?

15 MR. HAVELES: I have no problem with the marshal
16 delivering that direction.

17 MR. S. STIRLING: Certainly not.

18 THE COURT: Directing the marshal, asking them to put
19 any communications, including all requests, on paper. Thank
20 you, sir.

21 MR. S. STIRLING: We are checking across the street in
22 our little war room, but we did have at least two or three over
23 there. If they have not been packed home and sent home with
24 others, we can probably get one over here in 10 minutes.

25 MR. HAVELES: Your Honor, the only one I have, is my

F2PMBUC3

1 BlackBerry, and I don't think we should give my BlackBerry to
2 the jury.

3 THE COURT: Are we settled on the transcript?

4 MR. HAVELES: Yes. The three excerpts have all now
5 been handed up to your Honor.

6 THE COURT: You said three?

7 MR. HAVELES: I handed you two and Mr. Stirling handed
8 you one.

9 THE COURT: I have all three and everybody is in
10 agreement on what goes back?

11 MR. HAVELES: Yes, your Honor.

12 MR. S. STIRLING: Yes.

13 THE COURT: Page begins-ing 1334, page beginning 2116,
14 and the page beginning 1380.

15 MR. HAVELES: Yes, your Honor.

16 THE COURT: I will ask my clerk to give those to the
17 marshals to hand them to the jury.

18 MR. HAVELES: Your Honor, may I step out for 30
19 seconds while we wait for the calculator?

20 THE COURT: Everyone agrees that the calculator can go
21 back. We tried. We don't have one. If you come up with one,
22 show it to each other and if you are in agreement as to it,
23 just ask my deputy to hand it back. Don't go far.

24 MR. HAVELES: I'm thinking about going across the
25 hall, your Honor.

F2PMBUC3

1 THE COURT: Thank you.

2 (Recess pending verdict)

3 THE COURT: We received a note that says: Exhibits,
4 dash, for tomorrow. Solvency opinions for Frank and Grabowski.
5 Thank you.

6 Also, it says: We are at a temporary impasse with
7 respect to solvency. Perhaps we need to break until tomorrow.

8 With respect to the latter, what I intend to do is
9 bring them in and tell them they should break -- I'll read the
10 note -- that they should break for the night to resume their
11 deliberations, go straight into the jury room beginning at
12 9:30, encourage everyone to get there on time but say they
13 can't start their deliberations until everyone is there.

14 I also think I should just remind them, as they have
15 done so far, that there should be no communication regarding if
16 there is any split of the vote, that that should not be
17 communicated in a letter. That's not here, but it's
18 approaching that. So I think it is worth a reminder at this
19 point.

20 And then I think once I send them home we can discuss
21 how to address the request. Make sense?

22 MR. HAVELES: Yes, your Honor.

23 MR. S. STIRLING: Yes.

24 THE COURT: We will mark this note as Court Exhibit
25 15.

F2PMBUC3

1 (Jury present)

2 THE COURT: Members of the jury, I did receive a note
3 from you saying exhibits for tomorrow, solvency opinion for
4 Frank and Grabowski. Thank you.

5 Also, we are at a temporary impasse with respect to
6 solvency. Perhaps we need to break until tomorrow. Indeed I
7 think that's a good idea. You've obviously been working very
8 hard. And since it's approaching 5:00 I will send you home.
9 We will pull together a response to your request for the
10 solvency opinions for Frank and Grabowski that we will provide
11 to you in the morning.

12 Let me just give you a few instructions. First about
13 tomorrow. You may go straight to the jury room, as you do.
14 Please be there by 9:30. Again, we will have breakfast
15 refreshments there. When everyone is there you can begin your
16 deliberations, but I will wait until all of you there to
17 continue your deliberations. In between now and then the
18 instructions that I gave you before that continue to apply.
19 Obviously, you're communicating with each other in the jury
20 room about the case. But until you are all back in the jury
21 room tomorrow, no communications about the case through any
22 means, no research, as you know, about the case through any
23 means. Obviously, you are chewing on it now and you will
24 continue that when you are together tomorrow.

25 As I said before, but even more so, thank you for your

F2PMBUC3

1 hard work and diligence, and we will see you in the morning,
2 but do just head straight to the jury room in the morning and
3 start your deliberations and we will bring in or bring you out
4 for a response to your question as soon as we have got it
5 together. Thank you so much. Have a good night.

6 (Jury not present)

7 THE COURT: I forgot the reminder I said I was going
8 to give. We can do that in the morning, to remind them, as
9 they have, they shouldn't indicate any split of vote on any
10 matters.

11 Proposals for responses to the first request, to the
12 request.

13 MR. HAVELES: The request was for exhibits, your
14 Honor. And there are a number of exhibits that Mr. Grabowski
15 used during his examination. There are no exhibits that
16 Mr. Frank used during his examination. There is no written
17 solvency opinion. So if we are going to give them exhibits,
18 the only exhibits to give them are those that were displayed
19 during the course of Mr. Grabowski's examination.

20 THE COURT: Mr. Stirling.

21 MR. S. STIRLING: We disagree, your Honor. First they
22 asked for solvency opinions and, strictly speaking, I think
23 what they are asking for are the expert reports which are not
24 in evidence. If they want the opinions, I think that can just
25 as easily be construed, your Honor, as requesting the testimony

F2PMBUC3

1 of the experts where they express those opinions about solvency
2 or insolvency, and I think we could suggest to them that we can
3 provide them with the testimony on direct examination where
4 each of the experts express their opinions about solvency or
5 insolvency as of the dates that are relevant to the verdict
6 form that they are being asked to complete. Those are the
7 opinions. That is where the opinions were expressed in the
8 courtroom.

9 THE COURT: Mr. Haveles.

10 MR. HAVELES: The jury has already demonstrated it has
11 an understanding of the difference between oral evidence and
12 written evidence by making requests for testimony. They have
13 understood when they have made requests for testimony the
14 difference between oral evidence and written evidence. So it
15 seems to me that until they request testimony, we should not be
16 proffering testimony. The response is, there are no exhibits
17 other than the exhibits that were shown during Mr. Grabowski's
18 examination and see if they come back rather than prompting
19 him, did you really mean testimony. I don't think that's the
20 appropriate response.

21 We should just give them the exhibits. If they want
22 testimony, they can come back and ask for it. And if we are
23 going to give them testimony, depending on the question they
24 come for, we can decide what the purview of that testimony is,
25 but I don't think we should anticipate testimony until they

F2PMBUC3

1 inquire about it and we should just give them the exhibits, if
2 that's what they want.

3 THE COURT: Here is what I think. The testimony of
4 the experts referenced repeatedly their solvency opinions,
5 their reports on both direct and cross for both. So at some
6 level it may be a question of, are those in evidence or an
7 assumption that those are in evidence and they are looking for
8 those. I don't interpret it as asking for only the exhibits
9 that came in during the testimony. I don't think that's a
10 reasonable interpretation. And I think it's probably right
11 that they have not yet asked for the testimony.

12 But it seems to me the appropriate response would be
13 something like: This is what you've asked for. The written
14 report/opinions of the experts were not admitted in evidence.
15 What there is is their testimony and exhibits admitted during
16 their testimony. If you want some or all of that, ask. But
17 frankly, I think they are going to come back and ask for it and
18 I would just assume, to save a step and not have them come in
19 and then go back out, I give that response and say, you may be
20 asking for the testimony of the experts in which they express
21 their opinion and any exhibits admitted during that testimony,
22 and we will provide that for you. I'm happy to do it in two
23 steps or one and see what they ask.

24 MR. HAVELES: My recommendation is we do the two-step
25 process, your Honor, because it's a lot of testimony to give

F2PMBUC3

1 them.

2 THE COURT: What you'll do and have resolved and ready
3 to go before 9:30 is, you should have ready the direct and
4 cross of both experts and redirect, and then recross and
5 re-redirect.

6 MR. HAVELES: There is only one of each. We didn't
7 get too crazy. Might have seemed that way.

8 THE COURT: There were some witnesses where you got
9 that crazy. Maybe not the expert.

10 In any event, you'll have those prepared, so each side
11 will prepare with all sustained objections redacted out and any
12 indicated, disregarded, or stricken testimony redacted out.
13 And you'll need to exchange with each other.

14 Obviously, you will do, Mr. Stirling, the direct and
15 cross and redirect of Frank and, Mr. Haveles for Grabowski.
16 And gather any exhibits admitted during any portion of that
17 testimony.

18 MR. HAVELES: Yes, your Honor.

19 THE COURT: What I'll propose saying, they have asked
20 for the solvency opinions for Frank and Grabowski. As they may
21 recall, the written expert reports containing the experts'
22 opinions were not themselves admitted into evidence. Instead,
23 the experts' opinions were expressed through their testimony,
24 and the exhibits admitted during the course of their testimony.

25 So to the extent that they wish to see any particular

F2PMBUC3

1 testimony or exhibits admitted in the course of the testimony,
2 or all of the testimony or all of the exhibits admitted in the
3 course of the testimony, they should let us know what they are
4 seeking, let me know what they are seeking, and then they are
5 going to come back five minutes later asking for all of it and
6 we will send it back.

7 MR. HAVELES: Because they have to communicate by
8 notes, that's the way it has to go anyhow, as opposed to orally
9 polling them.

10 THE COURT: No. I wouldn't poll them. I would just
11 assume that that's what they are asking for because it's
12 reasonable and then send it back. But I'll tell them whatever
13 they indicate with respect to that we will just send back.

14 Let's just set a schedule for you to exchange those
15 because I want to resolve any disputes tomorrow. There
16 shouldn't be disputes here, but I've said that before.

17 MR. HAVELES: I think it will be a little laborious to
18 go through the objections. It won't be something to do in the
19 first hour when we get back uptown, your Honor. Probably given
20 traffic, we won't be back to the office until close to 6. I
21 would recommend we can exchange it by 9:00 this evening. That
22 way we have know we have redacted everything, particularly
23 since Mr. Grabowski's testimony was a tad longer.

24 MR. S. STIRLING: I think we can certainly do that.

25 THE COURT: And then you'll communicate with each

F2PMBUC3

1 other.

2 MR. HAVELES: I'll just e-mail a proposed mark-up to
3 Mr. Stirling.

4 THE COURT: You'll deal with back and forth and then
5 if there are any disputes, let me hear them by letter by 8
6 tomorrow morning.

7 MR. HAVELES: Yes, your Honor.

8 THE COURT: Anything else?

9 MR. HAVELES: No, your Honor.

10 MR. S. STIRLING: No.

11 THE COURT: I'll see you in the morning, 9:15. Thank
12 you.

13 (Adjourned to Thursday, February 26, 2015, at 9:15
14 a.m.)